United States Court of Appeals

for the Second Circuit

APPENDIX

74-2243

United States Court of Appeals

FOR THE SECOND CIRCUIT

PATRICK DEMAURO,

Plaintiff-Appellee,

—against—

CENTRAL GULF SS CORP.,

Defendant and Third-Party Plaintiff-Appellee,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant-Appellant.

APPENDIX

(Volume II—pages 317A to 637A)

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(In open court - jury present)

THE COURT: You recall the last two questions that were asked, something about a confidential report. You will keep in mind that he has testified under oath that he made no confidential report. And I say to you that there is no evidence in this case whatsoever that this doctor ever made any report that there was any more disability than what he testified to here, namely about up to ten percent. So it is not relating to him in any way whatsoever. There is no basis for that in this evidence nor has the lawyer any basis for it at this point in time either.

THE WITNESS: Thank you, your Honor.

THE COURT: Anything else?

MR. TESTA: I have no questions.

(Witness Excused)

W I L L I A M W H E E L E R, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. SHIELDS:

Q Captain, will you, having examined Defendant's Exhibit A, tell us or describe for us the weather, the seas, the conditions encountered by the vessel from the Port of Balboa, Panama Canal Zone, to Bayonne, New Jersey?

A From Balboa the vessel transited, went through the Panama Canal, cleared the Atlantic side of the canal, on the

morning of the 22nd of March, '71. On the morning watch that day, sea encountered winds of from the northeast by north point of the compass of force five to six. Northeast by north means 11¼ degrees towards the north from the northeast, from 45.

THE COURT: Is that on the Beaufort scale?

THE WITNESS: The wind force is the Beaufort scale, force five, force six. This is winds of about 24 to 30 knots. But the winds are out of the northeast. The ship is heading roughly about northeast so she has head wind, head seas, and she is responding pitching moderately in a rough northeast by north sea and a north, northeast swell. This is the morning watch.

Q What does pitching mean?

A Pitching is the longitudinal motion of the ship. The bow goes up and down and the stern goes up and down. The ship pitches longitudinally, as opposed to reeling laterally, sideways.

Q When a vessel pitches like that and her front or bow goes into a wave, is there anything that happens?

A Yes. Depending on the speed of the ship. The ship is preceeding at that speed of fifteen or sixteen knots. When they nose her front or bow into a heavy sea, she momentarily slows down, from maybe fifteen, sixteen knots

down to twelve, thirteen knots. And everything that is in that ship that is not secured moves forward, including the people. If you are on the bridge of a ship and she buries her nose into a heavy sea you will move forward and you will actually grab the railings of the ship. The dishes on the dining room table move forward when the ship noses into a sea.

Q Continue.

A On the afternoon watch that day she encountered wind force six from the northeast, still heading northeast. At 2000 the vessel was reeling moderately. That is 8:00 P.M. She was reeling moderately and pitching heavily at times in a very rough northeasterly sea and swell. At that time the vessel was steaming at reduced speed to prevent pounding. To prevent this excessive pitching, which was referred to, the bow of the ship comes up out of the sea and goes down into it and the pounding is in reference, refers to the possibility of bottom damage, to actually bending the plates of the ship when she comes down heavily into the sea.

Q But she is still pitching heavily?

A Yes. And the speed was reduced to prevent pounding.

Q Will you continue?

A Yes. On the 23rd the weather in general moderated.

In fact, the wind shifted around to the southeast, so now we have a tail wind. The wind is pushing us along. On the 24th the wind shifted back into the northeasterly quadrants. We have a head sea, but we are now heading generally northwest. The wind is northeast. We have a beam sea. The vessel is rolling more on the 24th. Vessel rolling easterly in a small northeasterly swell. On the 25th the winds come around in the afternoon to the easterly quadrant. We are still heading northwest, so we have a beam sea on the starboard side. Vessel rolling moderately. On the 26th, on the morning watch rolling heavily at times. Rough southwesterly sea and swell. Wind force seven to eight. That is about 45 knots. From the southwest. We are heading generally northwest. Now we have a beam sea on the port side. Heavy wind and beam seas on the port side.

Q Captain, when an officer of the ship makes an entry in the log, reeling heavily, what is meant by that?

A That would mean that the ship was rolling at least ten to fifteen degrees. Possibly more than ten to fifteen degrees.

Q On the 26th the vessel, I believe, reached Norfolk, did it?

A Yes -- Charleston.

Q Charleston, I beg your pardon. She then left

Charleston the following day on the 27th?

A That's right.

Q Will you again describe the conditions encountered on the voyage between Charleston and Norfolk, Virginia?

A From Charleston to Norfolk on the evening of the 27th the wind was out of the north, directly north. And the ship is heading at one period about northeast, and then when she rounds Cape Hatteras, coming around from Charleston to Norfolk, the wind force was up around six to seven, right out of the north and the vessel was heading at one time northeast and at one time northwest. So that she would firstly have a beam sea on the port side, and then she'd change course as she rounded Hatteras and then have a beam sea on the starboard side.

Q What is a force seven wind?

A Force seven runs around 40 knots.

Q Was she rolling and pitching on the 27th?

A On the 27th, yes. It reduced speed to fifteen knots. Heavy pounding, and that is on the afternoon of the 27th. And in the morning of the 27th they had reduced speed at four o'clock in the morning to prevent pounding. The vessel was rolling and pitching moderately in a rough -- I believe it is southerly sea, rough sea.

Q Then it would appear that she reached Norfolk,

Virginia, on the 28th?

A Yes, that's right.

Q How long is the voyage from Norfolk to Bayonne, New Jersey?

A Oh, it's just overnight. About 300 miles.

Q Were there any unusual conditions encountered?

A No. The weather was fairly moderate, southerly, force one, force two. Calm, on the afternoon of the 28th. They had nice weather from Norfolk to Bayonne.

Q They had one nice day on the trip, anyway?

A Yes, that's right.

Q Captain, assume, if you will, that a vessel left the Port of Balboa in the Canal Zone on or about March 12th and from March 12th to March 29th no one entered the lower 'tween deck of the number four hatch of that ship. And assume that that vessel encountered all of the weather conditions which you have described.

MR. LASOFF: Your Honor, I must object to that hypothetical. There is no testimony that no one entered the lower 'tween deck of that ship at all, anywhere on this record.

MR. SHIELDS: It is in, your Honor, the Third Party Plaintiff's Exhibit 1 and Defendant's Exhibit B, which shows the cargo activities and there was no cargo either loaded into or discharged out of the number four lower 'tween deck

at either Charleston or Norfolk.

MR. LASOFF: Your Honor, that doesn't mean that anybody went into that area.

THE COURT: Amend the question to include that, rather than what you had in it before.

Q Captain, assume rather than no one entered --

THE COURT: It has already been done by my direction. He understand that.

Q Assume that there was no cargo activity, there was no loading, or no discharging after the vessel left Balboa, and assume that the weather conditions described were encountered. Assume further that there were three or four wooden cases stowed in the number four lower 'tween deck on top of some piping, which is shown in Plaintiff's Exhibit 7, assume that those containers or boxes were not chocked, there was no fencing to hold them in place, there was nothing at all to support them or keep them in a permanent condition, they were more or less freestanding, except perhaps for two or three nails which had been driven through a piece of wood about one inch by six inches merely to separate the number four from the number five hatch; based on those assumptions, Captain, do you have an opinion as to whether or not it would be possible for that cargo, those three or four cases to have remained in the position described on top of those pipes?

MR. LASOFF: Your Honor, I must object to the form of the hypothetical, as not being complete. The testimony reveals that there was cargo stowed from fore and aft, which was right up against those cases on the pipe.

THE COURT: We will include that in the question.

MR. SHIELDS: I was going to put that as another hypothetical, your Honor. One witness said there was nothing next to those cases, another witness said there was.

THE COURT: Another witness said there was eighteen inches between the two, is that right?

MR. SHIELDS: My recollection is there were eighteen inches from these cases to the jeep in the next hold. That was Mr. Pratt.

THE COURT: All right. We will take the hypothetical on both situations to which evidence can be argued. But it is up to the jury to determine the actual conditions. The first question will be as just described by Mr. Shields, namely, eighteen inches from the jeeps, and there was transverse cargo the other way, wasn't there?

MR. SHIELDS: Yes, the one witness testified that cargo had been stowed athwartship and some of it was leaning against the cases in question which fell.

THE COURT: Do you know the question?

THE WITNESS: Yes, sir. The photograph shows three

cases that are lying in a disturbed condition.

Q Captain, there was testimony that there was a fourth case which had been removed before these photographs were taken.

A If these three or four cases had been standing up on top of this pipe, had been positioned on top of that pipe standing up against the ship's side, which is shown in the photograph, they never would have remained so under the conditions that the ship, the weather conditions that the ship encountered coming up. Everything on that ship that wasn't secured was moving. It had to be secured if it didn't move. If they had been standing up on the very afternoon the ship left the Panama Canal they would have fallen down into this position. If they had been supportd literally and there was eighteen inches between that and whatever was supporting it, the case would have leaned in that eighteen inches of space and when you remove the cargo supporting it that cargo would have immediately come down. Fore and aft, in the fore and aft motion, as I described before, the ship heads into a heavy sea, everything tends to move forward. It doesn't tend to move aft. The ship accelerates slowly, but when they breast into a sea, she deaccelerates rapidly. That is why you get the tendency of everything on the ship to move forward.

Q The cargo that we have depicted in Plaintiff's

Exhibit 7 is said to have weighed 700 pounds --

THE COURT: Who said that?

MR. SHIELDS: Withdrawn.

THE COURT: You see, what has happened here and what the parties are aware of is that the only one who testified about 700 pounds, and he really didn't testify, was Mr. Lasoff in his opening, and that is not testimony. Your recollection will count. In any event, there were cases with something in them and we don't know how much they weighed, at this point.

Q Captain, these cases had been stowed in the after end of number four, so that they would have been stowed forward of that board fence that was erected. Assume that there was nothing, no cargo of any sort, forward of those cases. Would it be possible for that cargo to have remained in place during the voyage from Balboa to --

A In my opinion, the weather encountered by the vessel would never -- these cases would never have remained in that position, piled one on top of the other, on top of the pipe, which itself is a slippery substance, the steel pipe.

Q Captain, are you familiar with the work of longshoremen?

A Yes, sir, I am.

Q And you are familiar, you said, with the safety

regulations for longshoring?

A Yes.

Q And are you familiar with the procedures of removing cargo?

A Yes.

Q Are you familiar with the removing of cargo from a hold by means of a hilo?

A Yes sir, I am.

Q That would be palletized cargo?

A Palletized or cargo such as in this picture. These cases are prepared and built, constructed to be handled with a hilo. One theyhad of them that has got a skid, there are three skids under each case and the skid is extra heavy, attached to give it height when it is resting on a pallet surface, to give it height so the forklift blades can get in under the case. These cases are built with the intention of handling them with a hilo.

Q Captain, assume that the after end of number four hatch was completely stowed across athwartship, from side to side, and that some of that cargo, at least one tier of it, was in contact with or leaning against the three and four cases which are depicted in Plaintiff's Exhibit 7, and assume further that the longshoremen in the hold working with a hilo had removed some of the cargo, the palletized cargo

which had been in the vicinity of and leaning against those cases, is there any proper procedure to be used by the longshoremen in regard to those remaining cases which were standing and leaning against the skin of the ship?

MR. TESTA: Objection, if your Honor please. There is no testimony in this case that any of those palletized cargo pallets that were anywhere near these cases were removed by the longshoremen at any time.

THE COURT: That is for the jury to determine. My recollection is that there was testimony to the effect that he went over and had cleared this area.

MR. TESTA: Yes, sir.

THE COURT: You don't remember that and, of course, it may not be the fact. I remember testimony to that effect. But it is neither his recollection nor mine that controls this case. You will make that determination and if the jury finds that to be a fact, then I find this to be a proper question with an exception to the third party defendant I.T.O. Do you remember the question?

THE WITNESS: Yes.

The condition you described would then activate the safety and health regulations, the clause where it says in tearing and breaking down, when necessary, means shall be taken to support the cargo to prevent it from falling. This

is a case when it is necessary. You have removed the cargo that was providing the lateral support to these four cases stacked up. You removed that. Now it would be necessary to do something to support it. Either support it or knock it down, take it down.

MR. SHIELDS: I have no further questions.

CROSS EXAMINATION

BY MR. TESTA:

Q Captain Wheeler, most of your experience has been at sea as the master of a ship, has it not?

A Not as a master. Most of it has been at sea -- I'd say equally. Fifteen years at sea, fifteen years ashore.

Q How many of those years ashore were spent in the stevedoring business?

A About three years.

Q And opposed to those three years how many years were spent at sea?

A What's that?

Q How many years were spent at sea?

A Of all the years? From 1935 until 1955. That is with a few years off in between, including Navy time, was spent on merchant ships.

Q So you have 20 years experience at sea and three years experience ashore as a stevedore?

A Right. And since 1955 to the present time as a marine surveyor.

Q This cargo was loaded aboard this ship somewhere else, wasn't it, Captain, from the log entries that you have before you?

A Yes. I don't know when this cargo -- the log entries don't show when this cargo was loaded.

Q Do the log entries show steel or metal products having been loaded aboard this ship at home port weeks before, sometime in the early part of March?

A I don't think the log entries show that. This is a bridge log, or deck log.

Q Is there one there for March 9th?

THE COURT: He is indicating to you the entry is not made on that log, is it?

THE WITNESS: It is not usual to enter the nature of the cargo in the bridge log.

MR. TESTA: I think it is there, your Honor. That is why I am asking the question.

THE COURT: If you say it is there, he will look for it.

(Pause)

Q Is there an Oakland, sometime around the beginning of March?

A March 9th, you said?

Q March 9th or somewhere, wherever the loading was made in Oakland.

A The ship was in Honolulu going towards Oakland. On the 10th she was at Oakland.

Q All right, March 10th, then. Is there any entry there that steel or metal products were loaded?

A I don't see anything on the 10th. There is an entry here at 10:50 in the morning that all cargo discharged for this port. Started loading number two and number four. Number four lower 'tween deck, steel.

Q Right.

A Oak, it's there. Steel, that's all.

Q Steel, Oak. And pipes are made of steel, are they not, Captain?

A Usually. There are iron, copper, brass pipes. Most pipes are made of steel.

Is there any indication of when these cases were loaded, from any of these log entries that you have before you?

A No, that says deck cargo was loaded and that the carpenters were securing cargo. I don't see anything else as to the cases. I am surprised to see that there is steel entered in the bridge log book.

Is there anything in this exhibit, which is Exhibit B here, which would indicate where cases were loaded, either in this exhibit or the log entries that you have before you?

MR. SHIELDS: Your Honor, may I ask him to clarify the question? What cases is he talking about?

THE COURT: He is talking, as I understand it, about the three cases that are in that picture.

MR. SHIELDS: They have never been identified.

THE COURT: Not that I am aware of. I don't know of anybody who said who put them on or anything else.

MR. LASOFF: I think the record is clear through that no cargo was loaded on this ship after Balboa. Anything that was in the ship was in at Balboa or before. Nothing after that.

MR. TESTA: If I get a concession that the cases were loaded prior to Balboa, your Honor, or from Mr. Shields?

MR. SHIELDS: No, I can't concede that, your Honor, because I don't know. They could have been loaded at Balboa or Oakland or some prior port. I can't say.

MR. TESTA: Prior to Bayonne, New Jersey, then.

MR. SHIELDS: Absolutely. They were on board the vessel when the vessel left Balboa.

MR. TESTA: Fine.

Now, Captain, you have before you photographs show-

ing steel pipe, do you not?

A That's right.

Q And you have before you cases, three large cases?

A That's right.

Q Assuming that those three cases were loaded on top of the steel pipe in that photograph, what would have been a proper way to load those cases on top of that pipe?

A They would have been loaded on top of that pipe with a forklift truck, the side of the case that has the heavy cleat on it would be the bottom side allowing the forklift truck to put them in. And when you put them in the next draft of cargo would be put right up against it. Now the ship is right alongside the pier, everything is stable, fine. You are loading it, you are blocking it out as you go across the ship.

Q This photograph, which is Exhibit 7, shows pipe and it shows uneven pipe, doesn't it, Captain?

A It shows a mixture there of pipe -- bundles of pipe and some wood to make up the -- there is a two by eight in the middle there to make up the difference.

Q I am asking about the pipe. Does that show a level surface or uneven surface?

Q It is a surface that would be suitable to store cases on alongside the ship's side. It would lend itself to

stability while the ship is in port.

MR. LASOFF: Move to strike the answer. The question called for a simple answer, was it a level surface or unlevel surface.

THE COURT: Read the last question.

(Question read)

It is an uneven but generally level surface.

THE COURT: Strike the last answer. We will leave this one in.

Q It is an uneven surface, is that right?

A Yes.

Q In your experience wouldn't it have been proper to make it even by putting some dunnage across it so you'd have an even surface on which to stow?

A The skids on these cases would have served that purpose.

Q I asked you if it wouldn't have been good stevedoring practice when these cases were loaded somewhere back prior to Balboa to have put dunnage aboard there to make a flat, level surface for them to rest on.

A It was impossible to put dunnage aboard there because if the dunnage aboard are sticking, the hilo can't go in. The dunnage would prevent the hilo from going in.

Q I didn't say anything about dunnage board sticking

out. Suppose they ran along the same direction the pipe ran.

A They'd be parallel with the pipe. It would tend to create an unstable condition.

Q It wouldn't make a level surface, is that what you are saying?

A It wouldn't make a level surface but it would be lost material thrown in there.

Q Would it have been better stevedoring practice to put down boards of some kind to make a level foundation for these cases to rest on?

A I'd have to disagree because the skids are built into the cases.

Q You would disagree, all right.

Wouldn't it also have been good practice --

THE COURT: Don't start with also, because he disagrees with you to begin with. Don't start anything with "and" or "also."

Q Wouldn't it have been good stevedoring practice when these cases were put on the ship back in Balboa or wherever they were put on, to have shored them up in some way with a support?

A This was. I have to assume it was because there was other cargo there to support this cargo.

Q I didn't ask you about other cargo. I asked you about wooden beams or supports to shore them up, to hold them in place.

A How are you going to put the other cargo in? The ship is occupied by wooden beams.

Q You just went through a long description of this sea voyage, Captain, do you remember?

A That's right.

Q The rolling and the pitching.

A Right.

Q And with cargo moving all over the place?

A That's right.

Q When the nose of a ship goes into a big wave or something, everything slows down, everything slides forward, including the salt and pepper?

A That is when it moved.

Q Wouldn't it have been good practice to put some big beams in there to shore it up so it wouldn't slide back and forth with the pitching and rolling?

A At the time during the loading process you don't put a case in and then shore it up. You put a case in, you put other cargo to block it in, block the space out. When there are void spaces left and you don't have other cargo to put in to fill it out, then you have to put shoring in. If

you have enough cargo to fill out the space, you don't need a stick of shoring.

Q Let's say that you were the captain of the Green Port when they put these cases on top of this uneven pipe that you have described, would it be your duty as captain of that ship to go down there and inspect that loading to see if it was secured, knowing that you were going to take a sea voyage?

A If it was checked out with other cargo, reasonable spaces, a few inches, it would be satisfactory.

MR. LASOFF: Move to strike the answer as not responsive to the question.

THE COURT: Yes, it isn't responsive. Unless you are withdrawing the question, we'll read the question to him.

MR. TESTA: All right. Read the question. I would ask your Honor to ask Captain Wheeler to please answer the questions.

THE COURT: But you ask in effect a why question. You asked him what he would do as a captain. He's got leeway when you ask that kind of a question, because you are asking him what he would do.

MR. TESTA: Can I have the question read?

THE COURT: Yes, and he will answer it. I'm not

aware he is not answering the questions. I don't think he is like Mr. Mackell. I haven't heard him extend his answers any more than is necessary.

MR. TESTA: I think the captain should confine his answers to the questions.

THE COURT: I would suggest you ask him questions which can be answered yes or no and you will have no problem with him. But when you start to ask him in effect why questions, he has to explain them.

(Question read)

A It would not have been my duty to inspect it, at that stage.

Q Isn't it the duty of the master of a ship at a port where cargo is loaded in the ship, to go down there and inspect it to make sure it is loaded properly before he takes off on a sea voyage?

A No, it is not his duty to continually inspect the loading process.

Q I didn't say continually inspect the loading process. I said after the loading process was finished, isn't it the job of the captain to go down there and check it?

A When it is completed, one of the ship's officers, not necessarily the captain, the captain will direct one of the

ships officers to observe, to inspect the stowage and if it is satisfactory to report back. If it is not satisfactory, to make it so.

Q If I told you that the captain of the Green Port did just that, that he went down there and inspected it --

MR. LASOFF: Objection, your Honor. There is no testimony.

THE COURT: There isn't a scintilla of evidence that anybody did that.

MR. TESTA: It is right in the deposition that was read, your Honor.

MR. LASOFF: You objected to that in the deposition.

MR. TESTA: No, I didn't.

THE COURT: You show it to me and if it is a proper basis for a question, we'll allow it.

(Pause)

THE COURT: We will take a five-minute recess. Please don't discuss the case in the meantime.

(The jury left the courtroom.)

(Recess)

(In the courtroom - jury not present)

MR. TESTA: I'd like to tell you what I find here, if I may.

THE COURT: If I recall that testimony, most of that was what people told him.

MR. TESTA: May I show your Honor the parts in the transcript that were read. There is a series of questions asked of the chief mate with respect to what his duties were. He said his duties were to supervise discharging and loading.

THE COURT: Yes, but the main thing that I find bad with your question is that you kept insisting that the captain --

MR. TESTA: I am sorry about that. I will make it chief mate. But there is a series of questions on page 24. He said he was in charge of discharging the ship or loading.

MR. LASOFF: Supervisor.

MR. TESTA: It says in charge.

THE COURT: Let me make this clear to you. If you substituted the chief mate for the carpenter, as far as I am concerned, that cures it. Is there any other objection to that?

MR. LASOFF: No.

MR. SHIELDS: I have an objection. What he says is he supervised, which we can't contest. That is his job.

MR. TESTA: It says in charge, your Honor. This is

a question that was read.

THE COURT: What is the difference between being in charge and supervising?

MR. TESTA: They are saying he didn't say he was in charge. He said it right here, it was read in the record.

THE COURT: Bring in the jury.

(The jury entered the courtroom.)

BY MR. TESTA:

Q Captain, I will revise that question to substitute chief mate for captain. If I told you that the chief mate on the Green Port testified that he was in charge of discharging the ship or loading, whichever cargo operation was being conducted at the time, would you agree with that?

A Not -- depending on what you mean by in charge. I would agree to the fact that he is the second in command of the ship, that in the absence of the captain he is in charge of the ship. One part of the ship's operation at that time is the stevedoring proceedings.

Q You would agree then what he says is so?

A He is not in charge of the stevedoring proceedings. It is the stevedoring company is in charge.

Q Captain Wheeler, he said he was in charge of discharging the ship or loading.

A As it refers to the ship. The personnel of the

ship. He is in charge of that ship.

Q So you disagree then with chief mate Gonzalez, who was the chief on the Green Port at the time?

MR. SHIELDS. I object, your honor.

THE COURT: Yes, I don't know if it is a disagreement. The objection is sustained.

Q After the loading operations are completed you do agree though that it is the job of the master or the chief mate to go down and check loading operations and see if it was safely and properly done, is that correct, Captain?

A It is that --

Q Yes or no.

A To see that the loading operation was properly done?

Q Yes.

A No, they have nothing to do with selecting the work methods.

Q Captain Wheeler, I only asked you if after it was all done, after the stevedores are all finished putting the cargo on the ship and leave, isn't it the job of the captain of the ship or of the chief officer to go down there and see if they have done it properly?

A They have to satisfy themselves that the stowage is proper. Knows the materials handling, but the end result is

proper.

Q Yes, the end result, the way the cargo is stowed.

A That's right.

The captain has to satisfy himself that it is stowed properly and securely for the voyage that is coming up, is that right?

A That's right.

MR. LASOFF: Your Honor, again we are using the word captain.

Q Or the chief mate.

THE COURT: It isn't the chief mate. He says it is the captain unless the captain is not available or he gives the duty to the chief mate. So it could be either one.

Q So if these cases were stowed on top of the pipe shown in these photographs without any chocking or shoring, the captain would go down there and look at it and say that is okay for the voyage, is that right?

MR. SHIELDS: I object, your Honor. There is nothing in these photographs indicating any of the content of the question and there is no evidence to support his question.

THE COURT: Overruled. But I think he has answered it about four times. He says essentially, as I understand his answer, that if you have piping and you have cases

on it and then you stow cargo against it, that is sufficient, and that is enough.

Q And he wouldn't have to do anything else, is that it?

THE COURT: That is what I understand his answer to be.

A That's right. If it was blocked out, chocked out with other cargo you don't need any other supporting, lashings or shoring or cribbing or fencing or anything. It is chocked out.

Q If it wasn't supported by any other cargo, would you need something there to keep it from sliding back and forth when the ship was pitching?

A Of course. If it was supported by other cargo, yes, you'd need some temporary or makeshift or jury rigged support to hold it in place.

Q Right. Everytime the ship would pitch it would slide forward?

A Right.

Q Everytime it would roll it would go from side to side?

A Yes.

Q You have described the voyage as being a rather heavy voyage, haven't you, Captain?

A They encountered some boisterous weather, yes.

Q Some what?

A Boisterous weather is a common description of this.

Q During the course of such a voyage would it be the responsibility of the captain or chief mate to go down there and check the cargo, knowing that the ship is pitching and rolling and tossing, to see if it was still secured or in proper position?

A They would know it if there was serious shifting of cargo, they'd know it without even going down there. You could hear it.

Q You could hear it banging around, can't you?

A Right.

Q If the cargo was heavy enough it would make a hole in the side of the ship if it wasn't properly secured, wouldn't it?

A That's right.

Q That would be dangerous as far as the ship's sinking is concerned, isn't it?

A It possibly could result in the loss of the ship.

Q This is in the lower 'tween deck around the waterline, isn't it?

A Yes.

Q If one of these things wasn't properly secured it would make a hole right in the side of the ship and the water would come in and the ship would sink, is that right?

A It is possible.

Q So the captain would have some duty to go down there and check the cargo during the course of the voyage which you indicated as being boisterous with a lot of pitching and rolling and heavy weather, right?

A The captain might not do it himself. He would depend on his officers to see that the cargo is chocked out, it is stable, secured, the ship is seaworthy, ready to go to sea.

Q And he would do that during the course of the voyage at regular intervals, wouldn't he?

A They'd make their routine checks, yes, and they'd listen for any noises, unknown or unusual noises.

Q How often would such routine checks be made, Captain, on this type of a voyage?

A Oh, everyday at least the mate will be forward to look at his anchors, to check the concrete in the hawse pipes, in the chain pipes, he'd look to see if all the deck gear was secured in heavy weather, or preparatory to heavy weather.

Q Would he also look to see that the cargo is secured in heavy weather?

A You'd have to look at it. You'd know it was secured because you checked it when it was loaded and you hadn't heard any noises or the ship hasn't taken any unusual lists or if a great amount of cargo shifts, the ship is going to list over.

Q The captain of the ship is not going to rely just upon hearing noises, is he? Wouldn't he go down in the middle of the ship and see if that cargo is secured?

A Not if he knows that it was secured when he left.

Q Isn't it possible it could break loose, Captain?

A If it was properly secured it could not break loose.

Q If it was properly secured it wouldn't break loose?

A That's right.

Q Whose job is it to see that it was properly secured before they made that voyage?

A The ship's officers see that it is secured and the ship goes to sea. And if it arrives with the four cases ore on top of the other you have to know that during the sea voyage it had to have been secured.

Q I believe in response to a hypothetical question by Mr. Shields you said these cases never would have stayed in place without shoring or securing in view of the heavy weather that the ship encountered, is that right?

A Without support of one kind or another.

Q Without shoring, you said, Captain, not without support of one kind or another.

MR. LASOFF: Your Honor, this is argumentative.

THE COURT: It is, Mr. Testa. It has been argumentative for the last six or seven questions. You can tell the jury that. They will listen to you.

MR. TESTA: If your Honor please, this is cross examination --

THE COURT: It is argumentative and I ask you not to ask argumentative questions. The objection is sustained.

Q Did you say that they would never have stayed in place without securing or shoring, Captain?

A Yes.

Q You said in response to the first hypothetical question by Mr. Shields and the second hypothetical question again you said they never would have stayed in place without shoring or securing, didn't you say that?

MR. LASOFF: Objection, your Honor.

THE COURT: That is a statement rather than a question.

MR. TESTA: I am asking the captain whether he said it or not.

Q Did you say that, Captain?

MR. LASOFF: Objection.

THE COURT: Go ahead, Mr. Testa. If that is the way you think you should examine, go ahead.

Q Did you say that, Captain?

A As I said, what I said or what I intended to convey was that if the cargo is not supported by one means or another, shoring, blocking out with other cargo, four cases one on top of the other as displayed in that photograph, would never have survived the sea conditions as reported in the deck log.

Q Captain, I show you Exhibit Number 7 and ask you if underneath those cases does not appear boards which represents shoring that was used to hold that cargo up.

MR. LASOFF: Objection to the form of the question, boards which represent shoring.

THE COURT: If he can answer it.

MR. TESTA: I am asking a question. I think I have a right to ask that question, your Honor. I don't know what Mr. Lasoff --

THE COURT: He has a right to object, too, Mr. Testa. You both have rights. This is not a one-way street.

MR. TESTA: I am just saying that --

THE COURT: You are just commenting on the Court's ruling and there is no need for that. I know what your rights

are and I know what his rights are, and I am sustaining both of you. I sustain the objection to this question. Ask another question.

MR. TESTA: I haven't asked a question yet, your Honor.

THE COURT: There is an unanswered question on the record, Mr. Testa. That is the question I sustained the objection to.

Q I ask you, Captain Wheeler, if the boards underneath the cases shown in that photograph are not shoring boards, in your experience as a stevedore and master.

A These boards primarily are two by tens, two by fours and four by fours. This is the type of material that is used to construct temporary bulkheads; to support cargo if it is stowed up in the wings you use a dunnage fence. One inch thick boards and then you use a few four by fours to support the dunnage fence. This material in the photograph is the remains of a portable bulkhead, or temporary bulkhead.

Q So it is the remains of shoring, isn't it, Captain?

A A temporary bulkhead. A division of space.

MR. LASOFF: Objection, your Honor.

THE COURT: Wait a minute. He is entitled to ask a question. He wants to know whether a temporary bulkhead in

his language would be snoring.

MR. LASOFF: That I object to.

A No, a temporary bulkhead is like a room divider. It doesn't support anything until something is put against it.

Q You mean the big boards in here, Captain?

A Yes. This is indicative to me of the remains of a temporary bulkhead. Not a cargo fence.

Q It is not a cargo fence?

A Not a cargo fence.

Q What do you mean by temporary bulkhead?

A Similar to a room divider, where you want to separate a space into two compartments. On a 4-C the 'tween decks between number four and five are common space. There is no watertight bulkhead between them. So they put a temporary wooden bulkhead on the line between, to separate number four from number five.

Q Is that shown in this photograph, Exhibit number five, Captain, which you have described as a temporary bulkhead?

A The temporary uprights --

MR. SHIELDS: Your Honor, before we go to this, may we have the last photograph that was referred to identified?

THE COURT: I think he did identify it.

MR. TESTA: I did.

THE COURT: You have a superabundance of caution, what was he talking about?

MR. TESTA: Seven.

THE COURT: What are you looking at now?

THE WITNESS: Number five, sir. The vertical wood members, two by ten planks jammed in under the overhead here constitutes a column or an upright that supports a temporary bulkhead, meaning a room divider, separating. It is not really intended to support.

Q I asked you if that is shown in that photograph.

A Yes.

Q Is it still standing?

A The upright is still standing.

Q In Exhibit number four, is it still standing?

A Yes, on the left-hand extreme edge of the photograph, it is still standing.

Q Does this photograph, Exhibit number four show the cases that fell?

A Yes.

Q Does it show a lot of big boards underneath the cases?

A Yes, it does, and the cases are now in number five hatch.

Q Did I ask you that, Captain?

A That is what it shows.

Q Did I ask you where they were? I asked you if it shows boards under there. Does it?

A It shows some boards at random under the cases.

Q It shows some boards under there, right?

A It does.

Q So that what you referred to as a cargo fence is still shown as standing in these photographs?

A Parts. The uprights are standing. The temporary bulkhead has been demolished, in those photographs.

Q It was demolished by the falling cases, is that right, Captain?

A Not necessarily. I don't know that.

MR. SHIELDS: Objection, your Honor.

THE COURT: Sustained. Calling for something for which there is no foundation whatsoever in this record.

Q Captain, when it comes time to discharge a vessel, is it part of the chief officer's job to supervise the discharge operations?

A Again, he is the person --

Q Yes or no, Captain.

A No, it is not.

Q If I told you that Chief Officer Gonzalez testified

that it was part of his job to supervise the work of the longshoremen to see they discharge the vessel properly, would you agree with that or not?

A I can't agree with that.

Q You can't, all right. If I told you that Chief Officer Gonzales, the chief mate on this very ship, on the Green Port, testified --

MR. SHIELDS: What page?

MR. TESTA: Page 24.

Q That if he, the third mate had seen any activity in the cargo hatch which he considered improper or unsafe, would he have stopped the longshoremen from conducting those activities, and he said yes to that. Do you agree to that?

A I have to state again that the officer of the ship is not a stevedoring supervisor. The stevedore supplies his supervision under contract.

Q You don't agree with the chief officer of this very ship --

A This was a misunderstanding there. He didn't understand you.

Q If I told you I didn't ask him that question, would you still say he didn't understand me?

A The man apparently did not understand the import of the question.

Q When the ship comes in, in your opinion, Captain, and you have been the captain of a vessel for many years, is it the job of the captain or chief mate or any of the officers to watch the stevedoring operation?

A They watch the proceedings to see that the cargo is going into its intended place in the ship, to see that the end result of the stevedores' work is satisfactory to be maintained while the ship is at sea.

Q And if they see anything that is not being done properly, is it their job to stop those activities, yes or no?

A It depends on --

Q Yes or no, is it?

MR. SHIELDS: Your Honor, I object.

THE COURT: He can't answer it yes or not. He indicates that yes is an answer under certain conditions and no is an answer under other conditions.

Q Who does the cargo belong to on the ship, Captain?

A It is owned by the shipper until the consigneee pays for it.

Q It doesn't belong to the stevedores, does it?

A Doesn't belong to the steamship company either.

Q Whose responsibility is it when it is on that ship?

A It is the ship's responsibility to carry the cargo.

Q Right. And they are responsible for the safety of that cargo, aren't they? They undertake to take it from one place to another safely and properly?

A That's right.

Q And if it is damaged they are responsible for it, aren't they?

A Unless they can lay it off onto the stevedore, they saw the stevedore damage it, that is what the mate is on deck for.

Q That is what you said, Captain, they lay it off onto the stevedore.

THE COURT: I don't know if the reporter heard it.

MR. TESTA: He said unless they can lay it off on the stevedore, that is their responsibility.

THE COURT: What is unusual about that? You mean if the stevedore takes a case and throws it up against a bulkhead the ship has to pay for it? You are indicating that is the case?

MR. TESTA: I didn't say anything, Judge. That is what he said.

THE COURT: The record speaks for itself. Part of it is heard and part of it is unheard. You are muttering

while walking away.

MR. TESTA: Read it back then --

THE COURT: I don't want any muttering or off-the-record things. Ask a question.

MR. TESTA: I only said that is what he said.

THE COURT: Never mind. You characterized his testimony and that is improper. You ask questions.

MR. TESTA: May I have one moment, sir?

(Pause)

THE COURT: We will recess until 2:15. Please don't discuss the case amongst yourselves. Keep your minds open.

(The jury left the courtroom.)

(Luncheon Recess - 12:55 P.M.)

AFTERNOON SESSION

2:15 P.M.

(Trial resumed - jury present)

W I L L I A M W H E E L E R, resumed.

MR. TESTA: I have no further questions of Captain Wheeler, your Honor.

CROSS EXAMINATION

BY MR. LAKOFF:

Q Captain Wheeler, would you answer my questions the way I ask them to you, if I ask for a question that calls for a yes or no answer, just give me a yes or no, please, all right?

A That I will do.

Q Captain, during one of the recesses you and I looked at these photographs through a magnifying glass to see if we could ascertain the weight of the cases, did we not?

A Yes, sir.

Q Incidentally, in looking through these photographs did you determine how many cases there actually were?

A The group of photographs indicate to me that there were four cases. They portray four wooden cases.

Q Are there two large cases and two somewhat smaller cases?

A Yes.

Q Looking at that photograph can you show us and mark with a pencil the weight marking tag on the large case that is so marked?

A On exhibit number four there is a paper envelope where the abbreviation wt. is shown, and I believe it is 1230, after the wt. Weight 1230.

Q That would be 1230 pounds for the big case?

A Due to the nature of the cargo, yes. U. S. Army cargo, they deal in pounds, not kilos.

Q There are two cases of that size?

A Yes, two cases of that size, yes.

Q You weren't able to find out the weight of the two smaller cases, were you?

A No.

Q But there were two cases each of 1230 pounds --

MR. SHIELDS: I object to that, your Honor. It doesn't show on the other ones. I don't really contest what the weight is, but there is no way of showing the weight of any of the others, including the one that appears to be similar.

THE COURT: There is one that is similar, and the one definitely is marked 1230.

MR. SHIELDS: Yes, that's correct.

THE COURT: All right.

Q Captain Wheeler, you have testified for various shipowners' attorneys repeatedly, have you not?

A Yes, sir, I have.

Q And as a matter of fact you have also testified for the firm of Alexander, Ash, Schwartz and Cohen, of which Mr. Testa is a member, repeatedly, is that right?

A Yes, sir, I have.

Q You have not testified for me, have you?

A No, sir, I have not.

Q Captain, at the deposition of the mate, the chief mate testified as such, page 24, line seven:

"Was that part of your job to supervise the work of the longshoremen, to see that they discharged the vessel properly?"

His answer to that was, "Yes."

Do you agree about that or not?

A I disagree with that.

Q I read you this question and answer:

"Q In connection with that job, did you have a third mate on duty to see that they did discharge the cargo properly?

"A Right."

Do you agree or disagree with that?

A I agree in part, that part of his job is to watch

the cargo operation, but he doesn't control. And the word "supervise" to me denotes control.

Q Then you are stating that the chief mate of an American flag vessel would not understand what the word "supervise" means?

A He supervises department --

MR. SHIELDS: Your Honor, I object to this argument of semantics. Obviously the word supervise is open to many interpretations.

THE COURT: I really find nothing to rule upon. He is simply answering questions at this point. I would overrule the objection if that is in the nature of an objection.

Q I read you this question and answer made by the chief mate:

"Q If you or the third mate had seen any activity in the cargo hatch which you considered improper or unsafe, would you have stopped the longshoremen from conducting those activities?

"A Yes, sir."

Do you agree or not agree with that?

A I agree when the conditions are of a certain nature. When time allows. You have humane considerations. If you see a man about to be injured you do something immediately. But if it didn't involve any urgency, then you

object through the proper channels, through the stevedoring supervisor.

Q Captain, I want you to assume that these facts have been testified to: that the Green Port came into New York with a bulkhead fence separating the lower 'tween deck of hatch number four and five, that in hatch number five stowed to within eighteen inches of that fence was a cargo of military vehicles jeeps, that in hatch number four running fore and aft along the after part next to this bulkhead there was a cargo of palletized cartons and cases that were stowed clear across the ship up to the level of the offshore wing where these pipes were stowed in four and five. Do you understand me so far?

A Yes.

Q On top of these pipes there were four cases which were tiered one on top of the other and they were secured to the side of the ship in hatch, I believe in hatch number five -- maybe it was four -- by nailing three nails to one of the sweatboards on the side of the ship, to make that clearer, the nail was driven through the sweatboard into the case, not through the case into the sweatboard. Do you understand that?

A Really, I can't see how it is possible.

Q Well, do you understand the question?

A I understand what you are saying, but I can't visualize the situation.

Q What I am saying to you is the testimony in the case.

A All right. I will have to listen.

Q All right. With those facts in mind, number one, would it be possible for this ship to have made the voyage to New York, from Balboa to New York, if that cargo, those cases on top of that pipe had not been chocked or fenced in any way?

A It would not have been possible for those cases to have withstood the elements that that ship experienced. Three nails driven through a sweatboard into a case would never -- the nail is in tension. The cases would just pull apart from the nail. To be support from the nail it has to be in here. The forces have to be across the nail.

Q I want you to take the assumption, then, that this palletized cargo was stowed clear up to the pipe and was blocking the pipe and the cases on top of the pipe. With that in mind could the ship have sailed from Balboa to New York if the cargo was blocked in?

A Yes, under that condition the pile of four cases would have probably survived.

Q I want you to further assume that the testimony

was when discharge operations commenced in the lower 'tween deck of number four, the discharge commenced from the offshore side running towards the inshore side of the hatch, and that the first tier of cargo taken out was the one closest to the pipe and to the cases. Do you understand that?

A I understand.

Q Further, that this work continued for some 25 to 30 minutes thereafter and that some additional eight to twelve palletized drafts of palletized cargo were taken out before anything happened, and that after these eight to twelve additional drafts were taken out, suddenly these cases came tumbling down, with that in mind what effect would the removal of that first tier next to the pipe and the carton have on the stow?

A That, the removal of that first draft of palletized cargo would make it possible, would leave a void into which the pile of four cases could have fallen.

Q And since that cargo was not stowed on level surface it would make it more possible than if it were stowed on a flat surface?

A Because of the surface, no. I can't agree with that.

Q Aren't these pipes round, Captain?

A They are in bundles. Pipes are round, yes.

Q Don't pipes even with bundles move with vibration of the ship's winches and hilos? Don't they shift their position?

A If they are resting just on a steel surface, yes. They are subject to movement to respond to forces. But if they are clamped down by other cargo on top of them, those pipes don't move, as long as the other cargo is on top of them. They are clamped down, in effect.

Q When the stevedore moved that first tier of drafts that were blocking these cases on top of the pipe, what should they have done?

A Taken some means either to shore up, brace up, lash up or remove, roll it down with the forklift truck, come in and take it out before they stood there or subject to whatever vibrations or developments have transpired, so they would not have fallen. They would have removed the possibility of them being able to fall.

Q If I understand you correctly the minute that lateral support was removed those cases were exposed to the risk of falling?

A That's right.

Q And at that moment something should have been done to correct that condition?

A That's right.

Q And if nothing were done for some 25 to 30 minutes thereafter, that condition and that -- the condition that was created would have been unsafe for all that time?

A Potentially so, yes.

Q We assume that the cartons did fall.

A Something knocked them over. They don't fall of their own volition. Some force has to come and act on those cases to knock them over.

Q What force is that, Captain?

A It could be the vibrations of the forklift truck that is working in that area working over the steel deck setting up a vibration system.

Q Just the simple running of a forklift machine would be enough in those circumstances to discharge the cases, is that correct?

A It is possible, yes.

Q You, yourself, say that you worked as a stevedoring superintendent?

A Yes, sir, I did.

Q What would proper stevedoring practices be in the circumstances we have described where you have a cargo of cases stowed on top of pipe with no other support except lateral support of the block tiering?

A Again the discharge from some other area along

that athwartship row of palletized cargo, not at the one that is on the onshore side that is supporting a visibly piled-up, plainly apparent pile of cases, leave the one that is holding it there, that is somewhere else and then you approach the four cases that are piled up from the side rather than from the forward end.

Q You, in your duty at sea both as a mate, seaman, master, are familiar with the term seaworthiness, are you not?

A Yes, sir.

Q And unseaworthiness?

A Yes.

Q When discharge operations were commenced from the offshore side removing the lateral support at that moment, was that stow unsafe and unseaworthy?

MR. SHIELDS: Your Honor, I object to that.

THE COURT: Sustained. That is the purpose of the jury here. They are to make that finding. He can give them whatever help he can from his expertise but the ultimate finding which is what this is, there wouldn't be any need for a jury if he can do that.

Q Captain, at that moment can you consider that stow to be proper any longer?

A I would consider this pile of four cases one on top of the other unstable to some degree.

Q And unsafe?

A Potentially unsafe, yes.

Q Why would this cargo have been nailed to the sweatboards?

A This is what I can't visualize. A sweatboard is fastened to brackets along the frames of the ship, the ribs of the ship. Between the back of the sweatboard and the ship's steel plating there is only about eight inches. You can't swing a hammer in there to nail a sweatboard to a case. It is impossible.

Q This fence that you see in the pictures, which has been apparently torn down in the pictures, what was the purpose of that fence?

A As I said before, simply a room divider. That space, that fence, rather, was constructed in that area when there was no cargo in it, in that immediate area. You have to have a clear space in order to construct a temporary bulkhead. And this is a temporary bulkhead, not a cargo fence.

Q It is just a bulkhead?

A Yes.

Q It is not meant to support the weight of these cases or any other cargo?

A The cargo, the bulkhead is built and the cargo then is placed against it, it will support the cargo that is

placed against it just like a steel bulkhead will support the cargo placed against it. It is a bulkhead rather than a fence.

Q Is it stronger than a fence?

A Oh, yes.

Q This fence was built with the stow of palletized cargo in number four resting against the fence, correct, according to the testimony?

A It was resting on the deck adjacent to the fence.

Q Adjacent to the fence?

A Right.

Q And on the other side of this fence, according to the testimony there was a space of eighteen inches between the cargo of jeeps. Would you say in that instance that that bulkhead had nothing to do with the stowage of the jeeps except to separate the palletized cargo from the jeeps?

A A port separation to distinguish the ports of discharge. This cargo on this side is for one port, the cargo on the other side of the bulkhead is for another port.

Q I want you to assume, Captain, that the jeeps were being discharged in Bayonne. Am I to assume that the bulkhead was put in place specifically for this purpose at this voyage?

A It might have been on there for a year before, I

don't know. This is a temporary bulkhead.

Q We do know that it was torn down when the cargo was discharged, don't we, Captain?

A It was. The photograph shows that it is apparently -- I don't know what the other end of it is, but this part has been demolished, yes.

Q The log says that this ship was berthed port side to forward. That is what it says. I don't know what the forward means, frankly. But you do know what port side to is?

A Yes.

Q I presume that the forward means bow in?

A Could be.

Q None of the witnesses saw these pictures being taken but the testimony is that at the time they were taken all the cargo had been removed and it must have been done during lunch. Would you agree that all the cargo was removed at the time the photographs were taken except for the four cases?

A Except for the four cases that the picture shows, I agree. The area in the picture shows no other cargo.

Q These four cases were probably waiting for a marine surveyor such as yourself to inspect them for any damage, is that correct?

A Could very well be.

Q Incidentally, at the time those pictures were taken, was that cargo still in number four hatch or was it in number five?

MR. TESTA: I am going to object to this. I don't see how the captain can possibly tell from looking at the pictures where the cargo is.

THE COURT: I don't either But I will allow him to answer and you can cross examine him.

A The pictures indicate to me that the four cases are resting in the number five space, lower 'tween deck space.

Q So they have been moved and all that wooden dunnage is not the place where the accident happened?

A I don't know that.

MR. TESTA: I object.

THE COURT: He says he doesn't know that.

MR. TESTA: I object to that comment by counsel that it was moved.

THE COURT: A statement is not evidence. Anytime a question is put, that is not evidence. He says he doesn't know, so for all purposes the question is not answered.

Q Captain, looking at those photographs can you tell us with reasonable certainty, prior to these cases falling whether there was any damage to those cases at sea?

A Looking at them, and I didn't look at them particularly with that in mind, but now looking at them with that in mind, I see no exterior objectionable type of damage. There might be a little splinter here and there, but there is no serious damage to the outside of those cases, that I see in the picture.

Q So there wouldn't have been any marked shifting of the cargo when the ship is rolling at sea?

A No, when the cargo breaks loose and is rolling, you know. It is crushed, visibly damaged.

Q Besides stowing this cargo by means of lateral support, isn't it also customary to use chocking and bracing?

A Where you need it. If you don't need it and you have two cargo consignments each supporting the other filling out the entire space, you don't need any shoring or bracing.

Q There is no testimony of cargo filling out the entire space except laterally fore and aft up to the pipe.

A Port and starboard, filling it out port and starboard.

Q We have no testimony at all about fore and aft cargo?

A No, I'm not aware of any.

Q And if there was no other cargo on top of that

pipe in a fore and aft direction, wouldn't it have been necessary to brace or chock that cargo to keep it from shifting fore and aft?

A The pipe?

Q The cases on top of the pipe.

A Yes. And the pipe itself.

Q What are chocks or bracings made of? What kind of wood, size?

A Use any dimensional lumber, two by two, two by four, two by eight, up to twelve by twelves depending on the commodity.

Q How would you secure that cargo of four cases to keep it from shifting fore and aft?

A You place a shore from the deck up in the catcher deck beam and the length of the shore is slightly longer than the vertical distance between the decks so you wedge the shore into the deck head. Then you brace off that shore to support that cargo from moving forward. You don't worry about it moving aft.

Q It is just going to move forward?

A Just going to move forward.

Q You mean in the way that this ship was heading on this particular voyage?

A I assume that every ship goes ahead. A ship

never goes astern with any appreciable rate.

THE COURT: You remember Milton's law of inertia. In this particular set of facts it can only be forward.

Q If there was no cargo stowed fore or aft of this four cases, would it have been necessary to brace or chock those cases?

A It wouldn't have been necessary to brace it on the forward end to prevent it from moving forward.

Q Would it have also been good practice, good seamanship to have built a platform over these round pipes so that the cases would rest on a level surface?

A No, this is not done. You would be creating void spaces by building this platform. You'd put the cargo on top of the pipe. It is reasonably level. Even if it is tilted a little bit. Tilted in towards the ship's side, it leans the cases in toward the ship's side. It is stable. It will stay there until you put something in front of it to contribute to its support. You don't need any wooden bracing or shoring. Just don't need it.

Q Captain, I want you to assume that all of the witnesses testified that the only cargo on top of this pipe was four cases, and that there was no fore and aft cargo bracing these four cases on the pipe. In order for that ship to arrive here, would there have to have been some chocking

or bracing or fencing to hold that cargo?

A I would expect something held those cases from shifting forward. Something has to. Otherwise, they would have shifted forward.

Q That wood that you see in those photographs under the cases, is part of it the same type of wood that bracing or chocking would be used?

A Part. There are some four by fours which are used in bracing, but shoring and bracing of this weight of cargo would never use a two by ten plank.

Q There is a four by four there, isn't there?

A There are a few four by fours. There are some four by sixes, two by fours, and four by sixes and two by tens to me is indicative of a temporary bulkhead.

MR. LASOFF: No further questions.

MR. SHIELDS: No questions, your Honor.

MR. TESTA: I have a few, your Honor.

RECROSS EXAMINATION

BY MR. TESTA:

Q Captain Wheeler, when cargo is stowed aboard a ship at the loading port, isn't it supposed to be stowed in such a manner so that it can be discharged safely by the unloading stevedore?

A I assume so, yes. It has to be stowed -- this is

Why in that section of the safety and health rules, tiering and breaking out, tiering applies to the loading of it. You are tiering it up. Breaking down and breaking it down. So the tiering section applies to the loading.

Q Yes. So that the stevedore who loads the ship is supposed to load it in such a way that the unloading stevedore can take the cargo out of there without having to worry about his safety, isn't that so?

MR. SHIELDS: I object, your Honor -- withdrawn.

Q Isn't that so, Captain?

A I don't think he is worried about the stevedore at the discharge port. I think he is worried about himself. He loaded it in such a manner, he puts it in a place of rest and he doesn't want it to fall down on him while he puts the next one alongside of it. This is what tiering means. He is looking for his own safety. Secondarily it would result in a safe condition at the discharge, provided it didn't shift.

Q He is only worried about his own safety, you say --

A I say principally. He is primarily concerned with the safety of his employees, so that is why he takes pains to tier it up properly

Q But isn't he supposed to load it so it can be unloaded without any danger to the unloading stevedores?

A He doesn't know what weather the ship is going to go through. He doesn't know what occurs to the ship. It is up to the discharging stevedores to break it down to protect his employees.

Q Can you answer that question yes or no, Captain?

A I don't think I could. I answered it to the best of my ability.

Q You say the loading stevedore has no obligation to the unloading stevedore, then, is that it?

A I don't think so, no.

MR. LASOFF: Your Honor, I am going to object. It has no basis in this case at all. There is no claim against any loading stevedore in this case.

THE COURT: I'm not aware of any, but I imagine he is trying to develop a point. If he connects it with this case I will allow it. Otherwise I will forget about it.

Q Isn't it a fair statement to say that a safe and proper stevedoring practice is for the loading stevedore to load the cargo into the ship in such a manner that the unloading stevedore can take it out with safety to himself and employees?

THE COURT: Sustained. We are not going to regurgitate this. He already testified to this. He said that is not the main function. The main function is to worry about his own people because he doesn't know what happens to

the cargo in between. Of course, he is not going to leave this there in a dangerous way that will hurt somebody else if he takes it off, isn't that so?

THE WITNESS: That's right. No traps.

MR. TESTA: That is the question.

THE COURT: That is the import of the question. But he is not worried about the other fellow, he is worried about himself.

MR. TESTA: But as your Honor said, he is not going to stow things so it would be dangerous to somebody else.

THE COURT: You can make that argument to the jury. The evidence is already in. He has already testified to that.

Q You were asked a hypothetical question by Mr. Lasoff, to assume that if the palletized cargo nearest to these cases was removed, then you were asked to assume that some 30 minutes went by, do you remember that?

A Yes.

Q If the palletized cargo nearest those cases was supporting those cases and was then removed, wouldn't those cases fall down immediately and not 30 minutes later?

A It could and it could not. Depends on the conditions prevailing in that space.

Q The conditions prevailing in that space were,

according to the testimony here, that those cases were just sitting there one on top of the other on top of this pipe, this uneven pipe. You testified before, Captain, that if you removed the cargo that was supporting these cases they would fall down, isn't that right?

A I said they have the potential then of falling down.

Q I am asking you now, if you removed, as Mr. Lasoff asked you to assume, that if the cargo nearest these cases was removed, why couldn't they fall down immediately instead of 30 minutes later.

A If they were in a sufficiently precarious situation, imbalanced, they would fall immediately. But if they were not, they might stand there until some other force acted upon them to cause them to fall.

Q But the testimony was in this case that they did not fall down immediately, there was some lapse of time, at least a half hour, is that right?

A Perfectly possible.

Q You say that just the operation of a forklift would cause these 1200 pound cases to fall down, is that right?

A It could.

Q A forklift is a little vehicle, isn't it?

A There are forklifts that weigh about 1500 pounds and there are forklifts that weigh 50 tons.

Q Did anybody tell you what this forklift weighed?

A No.

Q Normally isn't a forklift a small vehicle?

A The type of forklift that is used in the deck of a ship is about 6000 pounds, three ton.

Q Did anybody tell you that that is what this forklift was?

A Nobody told me.

Q You were asked to assume that there was shoring there, and that these boards that you saw in the picture constituted boards that could be used for shoring, isn't that right?

A Could be. It is possible to use such material for shoring. Expensive, but it is possible.

Q And in order to keep those cases from moving during the course of this heavy weather, it would have been good practice to use shoring, wouldn't it, Captain?

A If it was needed it would have to have been used. But if other cargo was there you don't need shoring. There is a big "if" in there.

Q When the ship pitches it goes forward, is that right?

A If there is nothing to prevent it from going forward, it will go forward. It will go forward if there is a void space in front of it.

Q You were asked to assume that there was a void space in front of these cases because that is the testimony in this case.

A All right.

Q So there is no way those cases would stay in that position throughout this voyage that you have described, without some shoring or bracing?

A That's right, if there was a void space with no shoring or bracing forward of them, they would have moved. During the voyage while the hatch was covered.

Q No, my question to you was there was no way that they would not move unless they were shored or braced, move forward, is that right?

A Or blocked with other cargo, right.

Q But there is no testimony that they were blocked with other cargo, so they would move forward unless they were braced?

A Right.

Q You said the shores would run from floor to ceiling?

A From the deck up in the deck beams of the next deck

above and the uprights are wedged in place. You have one of them. In this photograph, one of the photographs show it, the principle involved here.

MR. SHIELDS: Which exhibit is it?

MR. LASOFF: Which, number five, Captain?

THE WITNESS: Number five.

MR. LASOFF: Plaintiff's Exhibit 5. That upright is the type of upright you would put forward of the cargo and then you'd shore from that to the cargo, to the surface of the cargo to prevent it from moving forward.

Q Are there any other such beams or pieces of wood shown in these other photographs that would be used for shoring?

A There are other aspects of that same upright. That upright is in position as a shore.

Q How about this photograph, number seven? Anything there under those cases that would be used for shoring?

A The debris under it, yes. This is the part of the deck --

Q I didn't ask you if it was debris, Captain. I asked you if there is anything under there that could be used for shoring.

A It used lumber under the cases.

Q Could it have been used for shoring?

A It could have, yes, it could have been used for a temporary bulkhead.

Q Is there anything in this photograph, number six, that could have been used for shoring?

A This used lumber in this could have been likewise used for many purposes.

Q Could it have been used for shoring, Captain?

A Yes, could have been.

Q In Exhibit 4 is there anything there under those cases that could have been used for shoring?

A It is possible, yes.

Q Not is it possible. Is it shown in the photograph?

A It is there. It is possible that that material could have been used for shoring.

MR. TESTA: I have no further questions.

MR. SHIELDS: No questions.

BY THE COURT:

Q Knowing the history of how this ship went and the reports that were made in the log, et cetera, even in the face of witnesses testifying that there was a void space ahead of this particular box, in your opinion could that have gone through that voyage with a void spot in front of it all the time during the whole voyage?

A No, sir.

Q Would you have heard the noise down there, some clattering around?.

A Yes, sir. You would have heard those cases rolling about on deck as the ship rolled and pitched and it would have done damage to other cargo in the area.

Q Seeing those pieces of wood that you saw in the pictures, is it possible that those pieces of wood could have been used to shore it?

A It is possible. Then the pieces would not have moved.

THE COURT: Anything else?

MR. SHIELDS: No, your Honor.

MR. LASOFF: No, your Honor.

THE COURT: Thank you, sir.

(Witness Excused)

MR. SHIELDS: The defendant rests, your Honor.

THE COURT: The ship rests. Do you also rest on the third party claim against the stevedore?

MR. SHIELDS: Against the stevedore, yes.

THE COURT: The case is with you, Mr. Testa.

MR. TESTA: At this point I'd like to make the peremptory motion, your Honor.

THE COURT: All right.

MR. TESTA: Could you let the jury go so I can

make it in open court, your Honor?

THE COURT: All right. We can take a five-minute recess at this point.

(The jury left the courtroom.)

MR. TESTA: At this time, your Honor, I move to dismiss the third party complaint and for a directed verdict in favor of the third party defendant International Terminal Operating, Co., Inc., for the following reasons: first of all, on the testimony of all the witnesses produced by the plaintiff, Mr. DeMauro, Mr. Pratt, Mr. Goch, Mr. Menosky and Mr. Vosk, all of these men testified that at no time did the stevedore touch, the longshoremen or the stevedore employees touch this particular stack of cases which ultimately fell on the plaintiff.

THE COURT: That is the very complaint, they should have touched them. They should have done something about them. They should have removed the danger.

MR. TESTA: Your Honor, may I be heard? May I finish my motion, please?

THE COURT: I am indicating to you that in that particular aspect of it, it seems to me that it has no relevancy, because suppose they didn't touch it.

MR. TESTA: May I finish my motion, your Honor? I don't propose to engage in an argument with you. I wish to

make my motion and state my reasons for it, if I may.

THE COURT: Go ahead. But I am indicating to you now that that part leaves me completely cold because I don't see what relevancy it has.

MR. TESTA: May I finish, your Honor, and then --

THE COURT: You can finish as many times as you want and I couldn't care less how many times you want to do this. But go ahead uninterruptedly, go ahead and finish your motion. If you don't want to hear the Court's reflection on this in the hope to assist you in figuring out what the law is on this case, you go ahead and do whatever you want to do.

MR. TESTA: If your Honor please, I'd be very happy to hear the Court's comments but I'd like to be able to present my motion first before the Court comments. That's all I am saying, if I may do that.

THE COURT: Go ahead.

MR. TESTA: The witnesses in this case have indicated before, all five of them, the plaintiff and his four witnesses have testified that at no time did they touch these cases which ultimately fell on the plaintiff. Mr. Vosk, the hilo operator, said that his hilo at no time was anywhere near that --

THE COURT: I remember the testimony. I hope you are not going to do that.

MR. TESTA: I just want to review it slightly, Judge.

He testified that his hilo was fifteen or twenty feet away when this accident happened. They all testified that they did not touch it, they did not move it, they did not disturb it at any time, they did not do anything which would have caused those cases to fall upon the plaintiff. That is the testimony of the plaintiff's witnesses. The only testimony we have to the contrary, and there is no factual testimony on behalf of the shipowners and the third party plaintiff, the only testimony we have is the testimony of Captain Wheeler who has testified here with respect to the safety and health regulations and who has testified that if the palletized cargo was supporting these cases, if the palletized cargo was supporting these cases, and that's all that was holding them up, then if the stevedore removed the palletized cargo they would be removing lateral support which would cause it to fall. But the testimony in this case does not show that the palletized cargo was, in fact, supporting these cases. The testimony is to the contrary by these various witnesses who say that it was anywhere from eighteen inches to two or three feet separating the palletized cargo from these cases which fell on the plaintiff. So that there is no testimony in this case upon which that opinion of Captain

Wheeler could be based. All he was saying that, sure, if the palletized cargo was the only support of those cases and you remove it, they are going to fall. But there was no testimony in this case that the palletized cargo was the fact --

THE COURT: Nor is there any testimony in the case that anything caused these cases to fall at all. If you take that attitude of it, then you say the accident couldn't have happened because the plaintiff says they fell.

MR. TESTA: But the burden of proof is on the third party plaintiff to show that the stevedore breached its contract or in some way did not perform the stevedoring services in a workmanlike manner. And I'm saying that this burden of proof has not been sustained. By merely having an expert come in here and say upon hypothetical questions that if the palletized cargo was the support of these cases and if you remove the cargo the cases would fall, that is not enough. There has to be some factual proof in the case that the palletized cargo was, in fact, the only support of these cases. And there must be some proof that the cases, that when the palletized cargo was removed the cases did, in fact, fall. Again the proof is to the contrary. The testimony was that they removed the cases nearest the case, the palletized cargo nearest the cases, and some 30 minutes went by and something happened. So they didn't fall because the palletized

cargo was removed. That is not the reason they fell. So they have an expert say yes, you go down, dig down into cargo and if the cargo you remove is the only support of some other cargo you should shore it up; otherwise, it will fall on you, doesn't make out a case on behalf of the third party plaintiff. This is just speculation based upon hypothetical questions which, in turn, are not based upon any proof in the case. That is the point I am making, your Honor. What else is there in this case? You have regulations that speak about tiering and breaking down. I'd admit to your Honor that if you remove something that is the support of something else, it will fall down, But there has to be proof of the matter, and there is no proof in this case. We have pictures in evidence, there is testimony by Captain Wheeler, who read the log entries indicating that this ship had a stormy voyage from the point where these cases were put on top of this pipe, which obviously it is uneven, just by looking at it. Even Captain Wheeler said if you didn't shore up these cases everytime the ship pitched the cases would slide back and forth. These cases did not slide back and forth. There is no record in the log entry testimony that the cases were, in fact, secured. This was read by the chief officer and in the log entries at the ports, the various ports prior, the carpenters came aboard and there was shoring and securing

and the hatches were secured by means of shoring, your Honor. There is testimony in the case that these very boards under this constitute shoring --

THE COURT: I am going to give you two minutes more and then I am going to rule on this motion. I'm not going to listen to a complete recital of all the testimony in the case.

MR. TESTA: I am only saying that there is a complete and total failure of any proof of breach of contract on the part of the third party defendant or any breach of an obligation to perform the stevedoring services in a workmanlike manner. And absent such proof the third party plaintiff has not sustained its burden of proof and the third party complaint should be dismissed and I am moving for a directed verdict on those grounds.

THE COURT: Denied.

MR. LASOFF: May I make a motion, your Honor?

THE COURT: Yes.

MR. LASOFF: Your Honor, I move for a directed verdict against the shipowners on the issue of unseaworthiness. The defense and the only defense offered to this action by the shipowners is that the lateral support of these cases was removed by the stevedore. Their expert testified that the moment that lateral support was removed there came into

existence an unstable and unsafe condition. Twenty-five minutes to thirty minutes passed before these fell. Unseaworthiness does not require notice, it doesn't require knowledge, it only requires a condition. From the mouth of the shipowner's own witness he admitted that the moment the lateral support was removed there was an unsafe and unstable condition. Therefore, I move for a directed verdict on the issue of unseaworthiness.

THE COURT: But it could be damnum absque injuria. The right existed but he, himself, was a hundred percent to fault.

MR. LASOFF: I don't think the claim is claiming that the plaintiff was contributorily negligent in any way.

THE COURT: Oh, yes. They are claiming that he by his own conduct contributed to the happening of this accident.

MR. LASOFF: That is not my understanding with Mr. Shields. He may have claimed it as a defense, but I don't think he is raising it here. As a matter of fact he is withdrawing contributory.

THE COURT: I don't remember who made the requests here. Maybe they are Mr. Testa's requests that went into this area. In any event I will reserve decision on your motion.

MR. SHIELDS: Your Honor, at this time I think

I have to make a pro forma motion to dismiss the plaintiff's claim for failing to prove a prima facie case.

THE COURT: That I will deny. The only remaining aspect we have then is the defense of the stevedore. Bring the jury in, please.

(The jury entered the courtroom.)

THE COURT: We are at the stage of the proceeding now where the plaintiff has proceeded with the testimony that he desires you to decide the case on and the ship also. And now with Mr. Testa on behalf of the stevedore, he will produce any evidence that they desire to produce at this time.

V I C T O R P I N T O, called as a witness on behalf of the Third Party Defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TESTA:

Q Mr. Pinto, what is your present occupation?

A Task force coordinator for the city planning counsel of the City of Hoboken, New Jersey.

Q Will you speak up so I can hear you back here.

A Task force coordinatory for the city planning counsel for the City of Hoboken, New Jersey.

Q How long have you had that occupation?

A Oh, I'd say close to a year.

Q On May 30, 1971, what was your occupation?

A What was the date, sir?

Q I'm sorry, March 30, 1971.

A Safety man for I.T.O. at M.O.T., Bayonne.

Q On that day was there a ship in port there called the Green Port?

A Yes, there was.

Q Did you go aboard that ship?

A Yes.

Q On March 30, 1971?

A Yes, I did.

Q What were your duties as safety director for I.T.O. on March 30, 1971?

A To inspect the ship, to see if there were any dangers, hazards, to make sure that the ship was safe for the men to work.

Q Did you go into every hold and hatch on that ship?

A Practically every one that was working, yes.

Q Did you go into the number four and five hatches?

A Yes.

Q Did you see a cargo consisting of three cases stowed on top of some pipe?

A Yes.

THE COURT: I thought it was four, Mr. Testa.

Q Three or four cases, I'm sorry.

THE COURT: Didn't you say there were three in the picture and one out? I think you cross examined.

MR. TESTA: All right.

Q Did you see a cargo of four cases stowed upon some pipe in either the number four or five hatch?

A Yes, I did.

Q Did you see anything shoring or bracing that cargo on March 30, 1971, when you went into that ship?

A Yes, I did.

Q What did you see?

A It was shored up and secured so the cargo would not shift or move.

Q When you looked at it did it look safe to you?

A As I looked at it, yes.

Q Did it look safe so that the longshoremen could get down there and work removing cargo?

A Absolutely.

Q Was there any other cargo in that hatch?

A There were some palletized cargo in the wings of the ship and it was P.O.V.s in the square of the ship.

Q What are P.O.V.s"

A That is Personal Overseas Vehicles, owners' vehicles.

Q How close was this palletized cargo to these four cases that were stowed on top of the pipes?

A I'd say about a distance like this, maybe, eighteen, twenty inches, something to that effect.

Q Was any part of that palletized cargo up against those cases or holding them up in any way?

A No.

Q What was holding them up?

A The shoring was holding the cargo so it wouldn't be moved nor would it shift.

Q Will you describe what that shoring looked like? Describe the boards and how many.

A Two by fours, two by twos and regular dunnage wood, what we would call dunnage.

Q How was it constructed?

A Well, there was a fence, I think it was separating four from five because it was more or less one complete hatch, four and five. You could go through one hatch without going up on deck and coming down again from number four and five hatches.

Q How was the shoring constructed that you say was holding up these cases?

A Yes, the shoring was holding up the cases.

Q How was it holding them up? What position was it in?

A There was uprights and you had the fence on one side, which I think was actually separating number four from number five and then there was pieces of shoring, I would say wood, let's put it that way so the jury could understand that, was going this way (indicating).

Q What do you mean by "this way"?

A The ship was in on this side.

Q Do you mean fore and aft?

A Yes.

Q Were those pieces of wood between the cases and the palletized cargo?

A No. I will tell you what happened there was that they were nailed to the cases. If you have a picture, I could just show you what I mean there.

Q Before we get to that, having made this inspection, did you then go on about your duties?

A Yes, I did.

Q The next day, which was March 31, 1971, were you informed that sometime during that day that accident had happened?

A Yes, I was.

Q Where were you at that time?

A I was on another ship that was in the port. I was with a Mr. Morse from the United States Labor Department.

He was a compliance officer.

Q When you were notified of this accident, what did you do?

A I immediately made way to get down to the ship.

Q Did you go?

A Yes, I went to the ship.

Q Were you told where the accident happened?

A Yes, they told me it was in number five hatch.

Q Did you go down there?

A I went down with Mr. Morse from the United States Labor Department.

Q I now show you a photograph, this is Plaintiff's Exhibit 7. When you got down into that hatch, is that what you saw?

A Yes. That is what I have seen.

Q How soon after you were notified of this accident did you go down in that hatch?

A Oh, I figure -- I understand the accident was about 9:30, is that correct? I'm not sure.

Q How soon after you were notified did you go down in the hatch?

A Wherever I was on the other ship from there, maybe half hour, three-quarters of an hour I was there.

Q I direct your attention to the wood, the boards

that you see underneath those cases. I ask you if that is the shoring that you saw the day before that was holding those cases up.

A I truthfully tell you that it was the shoring from what was holding up those cases that was piled on the steel.

Q I show you another photograph which is Exhibit 4 and ask you if that is the way it looked after this accident when you were there.

A That is the fencing that came down when these cases came down, yes.

Q I am referring to the wood --

MR. SHIELDS: Your Honor, I move to strike that answer.

THE COURT: He wants to know about the wood.

Q I am referring to the wood that is under the cases.

A That is the shoring.

Q That is the shoring. Is that the same shoring that you saw in an upright position the day before?

A Well, yes, it is the same shoring because this here shoring would never be laying in that 'tween deck if I ever made a visit to that ship because they would have to remove it.

Q I now show you another photograph, Exhibit 6, and ask you if the wood that is under the cases in that photograph is the shoring that you saw the day before.

A In this picture here where you see this here nail as I stated before --

MR. SHIELDS: Your Honor, would you instruct the witness to answer questions, please?

THE COURT: Yes. Listen to the question and answer the question.

(Question read)

A Yes, it is the shoring.

Q Would you point out which wood in that photograph is the shoring that you saw the day before in an upright position holding these cases up?

A See --

THE COURT: Turn it around so the jury can see.

A As I stated before, as you see the nails in this, I think it is a two by four or four by four, that was nailed into the side of these cases that would hold them in place so that they would not fall. This here shows the nail in it. But there was many more of them outside of this. That is the only one I see in this picture.

THE COURT: Put an S on that to indicate shoring.

THE WITNESS: You want me to mark the nails?

Q Mark an S on the board that you say is shoring, and any other board in that picture that would constitute shoring.

A It is all shoring.

Q Mark an S on every one of them that you say are shoring boards.

(Witness marks)

Q Would you do the same thing in these two other photographs, numbers four and seven?

(Witness marks)

Q I show you Plaintiff's Exhibit 5 and ask you if there are any boards in that picture which would constitute shoring?

(Witness marks)

Q Are all the boards in these exhibits, four, five, six and seven that you have marked with an S, these are boards that you say were used as shoring the day before in an upright position to hold those cases in place, is that right?

A That's correct, sir.

Q Was Mr. Morse with you at the time?

A When I was summoned by the Terminal manager --

Q Answer the question. Was Mr. Morse with you at the time?

A Yes, he was.

MR. LASOFF: May we know which time, your Honor, after the accident or when he went there the day before?

Q After the accident.

A After the accident, sir.

Q After this accident, did you prepare an accident report?

A Yes, I did.

Q I show you a copy of a document and ask you if this contains your signature at the bottom.

THE COURT: Mark it first.

(Third Party Defendant's Exhibit A marked for identification.)

xxx

Q Does this have your signature on it, Mr. Pinto?

A Yes.

Q Can you tell us what the document is?

A Well, this --

MR. LASOFF: Your Honor, Mr. Testa has already described it as his report of accident, so what further description do we need?

Is that the report you made in connection with this accident?

A Yes.

MR. TESTA: I offer it in evidence.

MR. SHIELDS: I object.

MR. LASOFF: Can we see it?

(Pause)

MR. LASOFF: I have no objection, your Honor.

MR. SHIELDS: I object to it, your Honor. It is self-serving. I have never seen it before, and Mr. Testa told me that he had no such document, which is one of the documents which I subpoenaed.

MR. TESTA: If your Honor please, I object to that statement. I never told him any such thing.

MR. SHIELDS: If I may be precise, Mr. Testa gave me certain documents and said that is all I have. He did not say I didn't have the --

THE COURT: I don't want any more colloquy on that, but I'm not going to rule in that area at all. It is objectionable as a self-serving declaration.

MR. TESTA: May I pursue it a little further, your Honor?

Q Is this a report made in the regular course of business, Mr. Pinto?

A Absolutely.

Q Was it your duty as safety man for I.T.O. to make a report in the regular course of your duties for I.T.O.?

A Yes, sir.

Q Did you make this report in connection with your

duties in the regular course of your duties?

A Yes, sir.

Q Is this report based upon your own observations?

A Yes.

Q As a result of an investigation that you made after this accident happened?

A That is true.

MR. TESTA: I'd like to again offer it in evidence, your Honor.

THE COURT: It is no less self-serving than made before.

MR. TESTA: But it was made in the regular course of business.

THE COURT: I will still overrule it.

MR. LASOFF: I offer it as a Plaintiff's exhibit, your Honor. It it not self-serving with respect to me. I will do it now or when I cross examine.

THE COURT: No, at this point the case is with Mr. Testa.

MR. TESTA: Is your Honor sustaining the objection?

THE COURT: I did.

MR. TESTA: I have no other questions at this time of this witness.

CROSS EXAMINATION

BY MR. LASOFF:

MR.LASOFF: I offer this report in evidence, your Honor.

THE COURT: I sustain the objection. There is no question here in my mind that there is no charge here of recent fabrication or anything that comes within the exception. There is nothing in there different than what the witness testified to. I can't understand on what ground it is offered.

MR. TESTA: It is offered as a record made in the regular course of business.

THE COURT: It is only offered to bolster his testimony. I don't know why he has to state twice, once on the paper and once what he said. It doesn't come under the rule as I find it. Not every business document is allowable in evidence.

BY MR. LASOFF:

Q Did you prepare any other documents contemporaneous with the accident, Mr. Pinto?

A No, sir, just that.

Q Were you interviewed by anyone on behalf of your employer contemporaneous or shortly after the accident?

A No.

Q Were you shown any other documents by Mr. Testa prior to your testifying here today?

A I.o.

Q Can you tell us when on the 30th of March, 1971, you first saw this cargo in the number four and five hatch?

A I didn't get the question.

Q What time on the 30th, the day before the accident, did you see this cargo?

A I say it was about 7:30 in the morning.

Q 7:30 in the morning?

A I used to start at seven o'clock in the morning.

Q When you started at 7:30 in the morning, were the hatch covers off the upper 'tween deck?

A At that particulr time they were off.

Q At 7:30 the day before the accident?

A That's correct.

Q Were the hatch covers off the main deck at that time?

A Yes.

Q What kind of hatch covers were there on the main deck?

A They were wooden hatch covers.

Q They weren't pontoons?

A Yes, pontoons with -- yes, pontoons.

Q What kind of covers were there on the upper 'tween deck?

A Well, it was the regular hatch boards.

Q Had any longshoremen worked on this ship on the 29th of March, two days before the accident?

A It came in I believe in late afternoon. I don't think they started the ship. I'm not sure of that, sir.

Q It was the custom and practice in Bayonne that the longshoremen take the hatch covers and pontoons off, was it not?

A That is true.

Q The first time longshore gangs reported to work on board the Green Port was after 8:00 A.M., is that correct?

A I would say about 8:15.

Q That is on the 30th of March?

A That's correct.

Q You are saying before any longshore gangs reported to work on the 30th of March the hatch covers were off the main deck and the upper 'tween deck and you could see this cargo?

A I went down into the hatch, sir. I was looking for a P.O.V. vehicle that was requested by the Army for me to see if it was on board the vessel.

Q Did you take the pontoons off?

A No. The chief mate took them off. The chief mate and the men on the ship took them off, the crew. Sometimes

a vessel would come in and they did that. Some vessels wouldn't, the longshoremen would have to take them off. Unless I saw one that was hazardous on these here old C-3s and C-4 ships, I requested that the crew take the hatch covers off if they were dangerous for the longshoremen to operate and take them off.

Q Was it your job as a safety man not only to see that the dangerous conditions were corrected before accidents occurred, but to see and determine the cause of an accident?

A It is both.

Q Did you see and determine the cause of this accident?

A Did I see?

Q See and determine or see or determine.

A I don't get the question.

Q Did you render an opinion as to why this accident happened?

A Yes.

Q Why did this accident happen?

MR. SHIELDS: I object, your Honor.

THE COURT: Sustained.

Q Did you make an investigation as to the facts of this accident?

A Yes. I made the investigation with Mr. Morse from

the United States Labor Department, who boarded the vessel, went down into the ship with me and we investigated and was told by Mr. Flynn, the hiring agent on the pier --

MR. SHIELDS: Your Honor --

THE COURT: Sustained.

MR. SHIELDS: Could we please ask the witness to respond to the question?

THE COURT: Yes. Don't volunteer anything.

Q What did you determine from your own investigation?

A That due to the transit of the ship I felt that it loosened the shoring and by some means or other that the shoring gave way when the cases came down, and broke the shoring all over it. Broke it right apart.

Q The cases broke the shoring right apart?

A Yes. The cases went right against the shoring and it came right apart.

Q Then the cases toppled on top of Mr. DeMauro?

A That's right.

MR. LASOFF: I offer the report again, your Honor.

MR. SHIELDS: I withdraw my objection, your Honor.

THE COURT: Received.

(Third Party Defendant's Exhibit A received in evidence as Plaintiff's Exhibit 17 in evidence.)

xxx I ask you to look at your report and tell me what

you said in answer to question 25 on the report.

THE COURT: Wait a minute, Mr. Lasoff. Take it back. Take the report back.

MR. LASOFF: I'm sorry, I thought it was offered in evidence, your Honor.

THE COURT: Yes, it is. But take it back. It is in evidence. You read it. We are not worried about whether he can read English or not. What does he say there?

MR.LASOFF: "While discharging cargo in the wing the cargo gave way and broke through the shoring and fell on man's leg due to latent defect of stowage."

Q This word is "latent," isn't it?

A Yes.

Q What is a latent defect?

A More or less what the eye could see. And what I saw actually was what happened.

Q Am I correct that you are saying, looking at the way that cargo was stowed, Mr. DeMauro or any other longshoreman working there would have no idea that that cargo would fall down?

A Absolutely.

Q The way that you saw that cargo stowed on the 30th, the day before the accident, was there anything that the stevedore, and when I refer to the stevedore, I refer to International

Terminal Operating Company, not an individual longshoreman, or the ship foreman of I.T.O. or the hatch boss of this gang could have done to avoid this accident.

A A far as I could see it that particular day, it looked secure to me. That is, by looking at it. I didn't go to it or feel it or shift or move around there. I never did that to any type of cargo.

Q But to your eye and to the eye of anyone working there, did this cargo appear to be stable?

A Yes, definitely.

MR. LASOFF: No further questions.

CROSS EXAMINATION

BY MR. SHIELDS:

Q Mr. Pinto, where did you learn the term "latent defect"? From this gentleman or from other lawyers in his office?

A No.

Q That is a legal term, isn't it?

A I think so.

Q It is a defense that is available to longshoremen?

A It is what?

Q It is a defense that is available to stevedores?

MR. LASOFF: I object to the word "defense."

THE COURT: You know, the witness talks very low.

I can hardly hear him.

THE WITNESS: That is my natural way of talking.

THE COURT: I couldn't care whether it is natural or unnatural. I don't yell either, but when I am in court I have to speak loud so everybody can hear you. You just talk a little louder. I'm sure if you were going to yell to somebody in the hold they would hear you down there.

THE WITNESS: That is for sure.

THE COURT: Yes, I know that is for sure. I can't rule on this until I hear what you said. I didn't hear you at all and I am sitting alongside of you. Go back and let's hear the question and I will rule on the objection.

(Question read)

THE COURT: I will sustain the objection. He is not a lawyer and he doesn't pretend to be --

THE WITNESS: No.

THE COURT: Don't answer everything that is said around here. You answer questions when they are put to you. You sound like I am Charlie McCarthy and Edgar Bergen here. Just wait until they ask you a question and start to talk, and just answer the question. Don't say anything more than is necessary to answer the question.

Q You said on direct examination that in your opinion the falling of the cases of cargo was due to the

transit of the ship, is that correct?

A Yes, I stated that.

Q And you sat here this morning and this afternoon while Captain Wheeler testified, is that correct?

A Yes, I was here.

Q But you never said anything of that sort in your report, did you? Would you like to review it? This is Plaintiff's Exhibit 17.

(Pause)

A I stated while discharging cargo --

THE COURT: Wait a minute. Did you hear the question?

THE WITNESS: Yes, I heard his question.

THE COURT: The question is, is there anything in your report which says anything about it happening because it was in transit or some such question?

THE WITNESS: No.

THE COURT: All right.

Q How long did you work for I.T.O. before you retired?

MR. TESTA: If your Honor please --

MR. LASOFF: There is no testimony that he retired.

MR. SHIELDS: I thought he said he retired and he is now working for the Hoboken planning board or some such entity.

THE COURT: All right, go ahead.

Q Have you retired or stopped working for International Terminal Operating Company?

MR. LASOFF: That is a double question and has completely different meanings.

Q Did you retire?

A Yes.

Q When did you retire?

A Let me get this straight now -- I think it was in November of 1972.

Q How long had you worked for I.T.O.?

A Three years, a little over three years.

Q Before I.T.O., did you work for another stevedoring company?

A Universal Stevedoring Company.

Q How long had you worked for Universal?

A I was with them for a few years.

Q A few years?

A Right.

Q How long have you been working on the waterfront for stevedoring companies in general?

A I would say around seven years.

Q During the three years that you worked for I.T.O. how many accidents did you investigate?

A I investigated practically every accident that occurred at M.O.T., Bayonne.

Q How many is that?

A I can't give you that figure.

Q Roughly.

A I have had a very good, excellent record at Bayonne.

Q Would it be in the hundreds?

A In a three-year period?

Q Yes.

A Good possibility.

Q How many different ships did you board and inspect during that three-year period?

A Well, that is a question hard to answer, but I will answer it this way. Some days I had one ship, some days I'd have seven ships, some days I'd have nine ships. I can't tell you the exact amount of ships.

Q But many, many ships?

A We had an awful lot of ships coming in, yes.

Q And out of all these ships and all of these holds in the various ships, you are able to remember a piece of shoring between three cases of cargo for a distance of eighteen inches to other cargo, that was your testimony?

A Yes.

Q You remember this eighteen inch piece?

A Yes.

Q Would you show it to us on one of those photographs?

A Will you please repeat that question again to me, please?

Q I will withdraw the question and rephrase it. You have been able to identify all of the odd pieces of wood that are pictured in these four exhibits, Plaintiff's Exhibits 4, 5, 6 and 7 as shoring that will be used to secure the four cases that we are talking about?

A Yes.

Q Show me the eighteen inch piece that you found.

MR. TESTA: I object, your Honor.

MR. LASOFF: There is no testimony about any eighteen inches.

THE COURT: The eighteen inches comes in --

THE WITNESS: That was the distance from the palletized cargo and the shored cargo that was secured by the shoring.

MR. SHIELDS: Your Honor, my understanding was that there was an eighteen inch piece of board in between that space.

THE COURT: Apparently you are the only one

who understands that.

MR. SHIELDS: Then I withdraw the question.

THE COURT: I'm sure what he was talking about is the space was eighteen inches. But, of course, our recollection doesn't mean anything. It is the jury that will recollect what his testimony was.

MR. SHIELDS: It is not the first time my recollection has been faulty, your Honor. I apologize.

THE COURT: Did you hear the way Captain Wheeler described how you put the beam up to the ceiling, et cetera, and pushed it in?

THE WITNESS: Yes.

THE COURT: Was there such a beam here?

THE WITNESS: Let me see the --

THE COURT: No, when you went to look.

THE WITNESS: Yes, there was. That is what they call more or less of a stanchion.

THE COURT: You have to explain everything. If you just answer yes or no, you'd probably be home now.

THE WITNESS: I wish I could.

THE COURT: So do I. There was a beam going up to the deck above coming down to the floor of the deck below. Was that pushed up against these three cases?

THE WITNESS: It was adjacent to it.

THE COURT: Or four cases whatever it was.

THE WITNESS: I can explain it this way --

THE COURT: I want the jury to understand it.

THE WITNESS: In other words, the support that the judge is talking about, it extended like from down below here from the ground and went up to the ceiling of the 'tween deck. And they cut it a little longer so they will hammer it in, she will stay secure. And that is what the judge is asking about.

THE COURT: Was that up against the four cases?

THE WITNESS: Yes.

THE COURT: Was it nailed in any way?

THE WITNESS: The dunnage board was nailed to that stanchion, or that piece of wood that was upright.

THE COURT: There were nails on the beam or whatever you call it, and also on the other end nails on the boxes?

THE WITNESS: Yes. It was nailed into the boxes, sir.

THE COURT: All right.

Q I also understood you to testify, and if I am wrong correct me, that this Exhibit 17 is the only report you made and that you never discussed it with anybody from I.T.O. after the investigation, is that correct?

A Nobody, sir.

Q So that you haven't discussed this case with anybody since March 31, 1971?

A No.

MR. SHIELDS: Thank you.

THE COURT: Can I ask you just out of curiosity, sir. You used a term which I didn't quite follow you. As you used the term "latent," what does that mean to you? Is it something you can see or something you can't see?

THE WITNESS: You can't, something that you see -- no, that you can't actually see it more or less.

THE COURT: I thought before you said that it was something that you can see.

THE WITNESS: No, that you can't see.

THE COURT: That you couldn't see?

THE WITNESS: Yes.

MR. TESTA: No other questions, sir.

THE COURT: That's all.

(Witness Excused)

MR. TESTA: I have another witness, your Honor, but in view of the hour I don't know if you want me to start.

THE COURT: Oh, yes. The hour is only twenty to four.

P A U L J. K E E L E R, called as a witness on behalf of the Third Party Defendant, having been first

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duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. TESTA:

Q Mr. Keeler, what is your occupation?

A I am a marine consultant.

Q Will you state for the benefit of the court and jury your experience over the years, your background?

A I started to sea as an ordinary seaman in 1932. I rose in grade to become a cadet deck officer. At that time the steamship company had a contest at sea to bring a man ashore for executive training below the grade of second mate. I won that contest and I came ashore. When I came ashore I worked as a longshoreman, a winch driver, hatch boss, a checker, a clerk, assistant stevedore, a stevedore, assistant pier superintendent, a pier superintendent, and then in 1936 I was made traveling stevedoring supervisor for the company on the east coast of Canada and the United States. I resigned this job in April of 1945 to join the John W. McGrath Corporation, which at that time was one of the largest stevedoring companies in the world, as marine superintendent in charge of their New York operations. In October of 1953, I was elected vice president of operations of the McGrath Corporation, and their wholly owned subsidiary, Atlantic and Gulf. I resigned this job in October of 1954 to go into the

marine consulting business. After I was in that business for seven years and after an extensive survey of the American President Steamship Company I went to California as a vice president of the steamship company in charge of terminal and cargo operations worldwide. I resigned this job three years later, on December 31st, and came back to New York to resume my consulting business and I have been a marine consultant ever since.

Q Mr. Keeler, have you been sitting here in court listening to the testimony of the witnesses in this case?

A Yes.

Q You heard the witnesses testify to the manner in which this cargo was stowed. As an expert, will you tell us the proper manner in which these cases should have been stowed on top of this pipe, and I am talking now about the pipe reflected in Plaintiff's Exhibit 7.

A Yes.

MR. SHIELDS: I object to the form of that question.

THE COURT: It is an opinion. It is not phrased as an opinion, but I understand he is asking for opinion testimony.

MR. TESTA: I am asking for his opinion, is that right?

THE COURT: I will allow it. Overruled.

A These cases, I would have stowed these cases or any --

THE COURT: Wait a minute. Now we are in a different area. Not what you would have. Listen to the question.

(Question read)

A The proper manner to stow these cases would have been one case on top of the pipe, the next case on the deck alongside of it, making a width of two cases. The third case on top of the first case and the fourth case on top of the second case, which would give you two piles of cases two high for the four cases, instead of four cases running right straight up on their narrow widths.

Q Should there have been any dunnage or flooring put on top of those pipes before the cases were put on them, Mr. Keeler?

A Absolutely --

MR. SHIELDS: Again I object to the form of the question. This is Mr. Keeler's opinion.

THE COURT: Not only that, but it is a leading question of your own witness. I suggest you get opinions from him and also don't lead him.

Q Will you give us your opinion as to whether or not

a flooring made of dunnage or some type of wood so as to make an even base on top of those pipes should have been used before the cases were put there.

A Yes, I do have an opinion.

Q What is that opinion?

There is no possible way of getting a stable base for those square cases on top of this pipe that you see in bundles here, without the use of a blocking or chocking wood or dunnage, and the dunnage does not have to run athwartship across the ship where you can't get at the face of the stow. The dunnage can run with the pipe and build the edge of the pipe up which you can even see in the picture here is very low and slanted.

Q In your opinion should anything else have been done as far as chocking or shoring those cases was concerned after they were placed on those pipes?

A What was the beginning of this question?

(Question read)

A Definitely. When those four cases were tiered up in a straight tier four high, there was an absolute need for a fencing to go across there to keep them there on top of these bundles of pipe. Those cases were heavy, they were 700 pounds apiece --

THE COURT: Wait a minute. Let's not get into that

700 pound bit. We don't know the weight of any of them except one and that was 1230 pounds. Only the lawyers have been talking here about 700 pounds. Nobody else. Subject to that change, at least two of these cases were the same size. One weighed 120, we don't know what the smaller cases weighed.

Read the question.

(Question read)

THE COURT: May I ask you something? Are you wanting him to assume that they are four tiered or the way he suggests that they were, two separate ones with one on top of the other.

MR. TESTA: No, the way he heard the testimony, your Honor.

THE COURT: All right.

MR. SHIELDS: Your Honor, I will object to any questions based on the way he heard the testimony.

THE COURT: We will indicate that four i a tier, one on top of the other. Do you remember the question now?

THE WITNESS: Yes.

THE COURT; All right.

A There was a need for a fence and by way of explanation I was proceeding to explain that the pipe would not give that rickety tier a stable base because there is nothing

stable about five little bundles of pipe of different sizes and different weights.

MR. SHIELDS: Your Honor, I move to strike his answer. There is absolutely no testimony about a rickety tier. This is something concocted by the witness.

THE COURT: Strike out the rickety part of it. He is showing the jury the picture at the same time, so that what you are saying in effect is the way these pipes are depicted in the picture.

THE WITNESS: That's right.

Q Would you continue with your answer, Mr. Keeler?

A What was that?

Q Did you finish your answer?

A Yes, I finished.

Q All right. You were here today when Captain Wheeler went through the log book with respect to the voyage of this vessel and the pitching and tossing of the vessel and the heavy seas. Do you have an opinion as to what would happen to these four cases stowed one on top of each other in that kind of weather if they weren't shored up or properly secured?

A Yes, I do have an opinion.

Q What is that opinion?

A Well, regardless of whether there was pallets

alongside of them holding them there, in the type of weather that this vessel went through with force seven, eight winds, with beam seas and the watch officer's notation that the vessel was rolling heavily, these heavy cases would have pounded through the cargo that was blocking them if they hadn't been shored. They must have had a shoring on them because they were high and the pipe plus the four cases put them pretty well up in the air. And I don't know exactly what was alongside of them, but no matter what was alongside of them, if you didn't have a fence in there those cases would have been working on that other cargo, because that cargo was not shored. If, as I understand the way the ship was stowed, in the square of the hatch they had automobiles. You can't block cargo against automobiles. It is impossible. The automobiles have got to stay by themselves and the cargo has to be shored.

MR. SHIELDS: Your Honor, Mr. Keeler is again going a little beyond the record. This testimony of automobiles. As I recall, there was testimony of one jeep.

MR. TESTA: That is an automobile, your Honor.

MR. LASOFF: Your Honor, in his own deposition of his mate there was testimony that automobiles were loaded in the four and five hatch.

THE COURT: I am going to rule that the jury can,

if their recollection is as I would expect it is, could find that there was more than one car there. It is up to them to make the finding, however.

Q Would you continue with your answer before you were interrupted with respect to the manner in which automobiles and vehicles are chocked?

A Yes. Automobiles and vehicles are, they are chocked with wood and then they are lashed with either, in the ship it can be rope or wire rope, steel cable. And you crib the cars first. You put two 2 x 4s down the side of the car alongside of both the wheels, the front wheel and the rear wheel. You take a strong board or another piece of 4 x 4 if you want to do it the expensive way, and put that long board against the front of the two tires in the front. And nail it down to the two that you have alongside the tires. That lifts that board that you put across eight inches high and forms an effective chock that the wheel really can't go over unless that car got a good jolt. You do the same on the rear wheels, those two side timbers that you put down are sitting behind the rear wheels, you take another timber or another board if you got the bumper room over the four inches and the exhaust pipe room where the tail pipe comes down, sometimes you have to put a board in there and you chock that board against the curves of the two rear wheels and you spike that down onto the

two side boards and you effectively have the auto sitting in a crib. Now, the crib is on a steel deck. You can't nail the crib to the deck. You don't have wood there. And you must lash then the whole car, sitting in its crib, you must lash it to something on the ship that is permanent and will keep it and the crib right there. The crib keeps the car from rolling on its wheels against the lashing or sliding on the deck against the lashing to where they could loosen the lashings up either by going fore and aft or by going sideways. That is the way you lash and secure an automobile. And for that reason you cannot bring cargo up to the automobile. There has got to be a fence. If there is any cargo that is not stepped down from that automobile, like one tier, two tiers, three tiers, four tiers, five tiers, you could take a chance on that without a fence. Stable, good carton cargo, barrels to start with or something, and step your cargo off, you wouldn't need a fence. But if you bring the cargo anywheres near those cars, say to a height above five foot, you must have a fence or you will find the cargo right in on the automobiles.

Q These automobiles would not be the type of cargo that would support or hold up these big cases, would they?

A Yes.

Q I am talking about the automobiles that are there,

these cars.

THE COURT: He is agreeing with you. In other words, if he said no, it is a double negative. He is saying you are right.

Q Something else would be needed to support these huge cases, these big cases we are talking about, isn't that right?

A Yes.

Q I take it you heard the hypothetical question that was put to Captain Wheeler when he said that these cases would never have stayed in place without shoring or securing. Do you agree with that?

A That these cases never would have --

Q Never would have stayed in place without shoring.

A Yes, I agree with that.

Q And I guess you also heard the testimony of this eighteen inch space that separated the palletized cargo from these cases, did you not?

A Yes.

Q Without shoring and the ship going through all these heavy seas, would those cases stay in place or would they fall over?

A They would have worked their way against whatever was on those pallets. They would be working against there the

whole time.

Q Would they eventually have created a space that they would have fallen into, by moving the cargo that was next to it?

A I didn't understand that.

Q While they are working against this palletized cargo, would they eventually have moved it so as to widen that eighteen inch space?

A Not only move it, it would take the draft part, probably, if the weather was really as bad as they say it was, because it would be highly unusual in a deck, a 'tween deck of this type ship, would not be more than ten foot high in its clear reaches, and maybe not even ten foot. Maybe 9-6 or 9-8. If you take a palletized load of cargo, the pallet measures six inches. Whatever cargo you have on it you are endeavoring to get at least a ton weight on there, if you can, or whatever the product is. And a draft of cargo would normally stand as high as the rail of that jury box, from the floor, with the pallet under it. If you put two of them on, they are going to be up in the air. But it isn't normal that you would do that in a deck where there was automobiles stowed in the center of the deck. You would probably have only one pallet load there and possibly something loose on top of it. I don't know, I wasn't there. And then

these cases would be high --

MR. SHIELDS: Your Honor, I am going to object to this line of testimony where he is hypothesizing that certain types of cargo might have been there, when none of us seem to know what cargo was there. Yet he does. I might have to strike out that portion.

THE COURT: I will take up to what he says so far up until he said, "I wasn't there," I will strike that and let the rest remain.

Q Without shoring or without securing it, the description you have given as to how this cargo would have worked its way back and forth, in your opinion would it have been possible for this ship to come in with this cargo sitting upright on top of these pipes?

A It would have been impossible.

Q In your opinion, where would these cases have come to rest eventually as a result of all these heavy seas?

MR. LASOFF: Objection, your Honor. It has no relevancy to the issue.

THE COURT: If he can give an opinion I will allow it.

A Can I have that again?

(Question read)

A These cases -- now, am I to assume that there is a

fence shoring them or not shoring?

Q Based on the testimony you have heard on all these pipes in the heavy seas.

THE COURT: Never mind about the testimony he heard because he's been here from the beginning. You want him to assume for the purpose of this question that there was no shoring.

Q Yes.

A No shoring, at least the top boxes would have been over on the other cargo, the palletized cargo. The boxes that were low enough to be shored by the palletized cargo would probably still be in their position. I don't know whether they'd be stable but they'd be between that palletized cargo and the skin of the ship. But the ones up on top they'd be either on top of the palletized cargo or they'd have slid off that and were down between the palletized cargo and the automobiles.

Q In your opinion, sir, whose obligation is it to see that cargo is properly stowed on a ship at the loading port? Whose job and obligation is that?

MR. LASOFF: Your Honor, how many questions do we have now?

THE COURT: Yes, that is more than one question.

Q Whose obligation is it to see that cargo is properly

stowed on a ship at the loading port?

A After the loading is finished?

Q Yes.

A The vessel's.

Q If they see something that is not properly loaded, what should they do?

A Well, the ship's officers -- can I explain this, your Honor?

THE COURT: That is what he is asking you, I assume.

Q Yes, please do.

A There is not many ship's officers and when they are in port they have many duties. Shore duties, duties of the vessel itself, maintenance, papers, customs, immigration, et cetera. And they can't get around a vessel when it is loading, in all places every five minutes. They do have a cargo officer, some well-run vessels have a cargo officer forward and a cargo officer aft. These fellows are out there if they are good men pretty conscientiously and they are looking in the hatches and getting a general idea of what is going on. And really they are watching for the safety of the ship and the safety of the cargo, and the fact that when the cargo arrives at its destination the port rotation will be correct. When the vessel gets to the first port of discharge

all the first port of discharge cargo should be handy to be discharged and not blocked in by a port beyond, a second or third port. So the cargo mate is really watching out. He is watching the safety of the ship, he is watching the safety of the cargo to see that the stevedores don't break up the cargo, dent it, damage it, crack the cases. And then he is watching port rotation. But how the cargo is put in, what gear they use and all that, he leaves that to the stevedore.

Q After it is done, sir, if he saw any cargo that was not properly stowed in his opinion --

A He would either make arrangements to get ahold of the stevedoring superintendent and have him pass orders down to the hatch boss who is working there to restow that cargo or if there was a lashing and shoring gang, carpenters aboard the ship, he would instruct them to go in there or if they were working for the stevedore, consequently he would instruct them to go in and reshore that cargo.

Q Would you agree that the stowage of cargo is the responsibility of the ship, sir?

A It is, yes. The final stowage and whether it is seaworthy or not and whether --

MR. SHIELDS: Your Honor, may I interrupt? May we have some definition here? Mr. Keeler has already stated the stowage, the loading is the responsibility of the stevedore.

Only after the loading does the ship's officer come in to do whatever he does. That is Mr. Keeler's very testimony.

THE COURT: The point is that if this is in the nature of an objection, I overrule it because in the first place I don't think that he got a chance to finish his answer.

MR. SHIELDS: I am objecting to the form of the question because counsel is phrasing his question contrary to the very statements that Mr. Keeler has already made. In effect it is a type of cross examination of his own witness.

MR. TESTA: If your Honor please, I was only asking this man if after the stowage was all completed --

MR. SHIELDS: You didn't say that.

MR. TESTA: I did say that.

THE COURT: That is true. But the point of the matter is from that point on you were in effect asking him another question which assumed that that answer was wrong, in effect.

MR. TESTA: No, your Honor.

THE COURT: That is the way it seems to be with the two questions immediately following.

MR. TESTA: Let me withdraw the question and put it another way.

THE COURT: Withdraw it and then proceed.

MR. LASOFF: Your Honor --

THE COURT: Just a minute. We have to hear from Mr. Lasoff.

MR. LASOFF: Your Honor, I think the question actually is a matter of law for the Court regardless of what any of these witnesses say.

THE COURT: It is, and that is the thing that surprised me that nobody objected on that ground up to this point. I would have ruled on it at the time. I assumed you were all satisfied that I let him answer in this fashion.

MR. TESTA: Captain Wheeler answered that very question, your Honor.

THE COURT: You should have objected. Two wrongs don't make a right.

MR. TESTA: I was happy with his answer, your Honor.

THE COURT: But they are not. The point is that actually a witness is supposed to tell you the facts and give you opinions and then you, yourself, are going to determine whether there was unseaworthiness or negligence here. And in this area here I think the testimony is very clear. I don't know why it needs any further elucidation. There is no question about while the work is going on the only one who can do the work and the only equipment that is used is under the control of the longshoreman and he has that obligation and he does it.

Once it is finished, of course the ship has to look it over. If there is a case hanging down like the sword of Damocles, he is not going to pass it by and say, "Hey, that is the stevedore's obligation, we are not going to worry about that." Is that a fair statement?

THE WITNESS: Quite right, your Honor.

THE COURT: I think the jury understands that point.

Q Mr. Keeler, in your opinion would the operation of a forklift in a hatch of a vessel cause big cases like this to fall down?

A As they were stowed --

MR. LACOFF: I object to the form of the question, your Honor.

A If they were properly stowed or what?

THE COURT: No, not properly stowed. The question is very clear. Under the circumstances of this case, where they are on pipe, et cetera, that is the thing that is causing him to pause to answer.

THE WITNESS: Yes.

THE COURT: You distinguish between that kind of a setup and where it is really stable.

THE WITNESS: That's right.

THE COURT: When it is on the pipes, can it fall

as a result of the vibration of the forklift?

THE WITNESS: Yes, it would be unstable. Anything could make them stable.

Q It would be unstable, you said?

A Yes.

Q You had these photographs, you have one of them before you that is an exhibit in evidence. Can you tell me what the wood looks like under this photograph, number seven in evidence? What does that look like to you, sir?

THE COURT: You have two choices at this point -- as a matter of fact, three. It is either shoring or it is a fence or it is a combination of both.

THE WITNESS: Or the remains of other shoring. But this shoring is under the case. I can see uprights here, I can see nails, horizontal pieces. This was a fence. Exactly Howmany horizontal boards are on it, I can't tell because they are laying all over the place. But there are uprights here, there are heavy boards, that would be horizontal pieces. And they are under the cargo. You cannot get wood under the cargo, you cannot be working on pallets with a floor that looked like this because the pallet doesn't need that kind of a floor. That wood came from some place into an area of the deck where pallets were, where a man was coming in and lifting up skids and taking them out, and you would have a

clean deck. Where that man and where those pallets were working this lumber was not there when the last pallet went out. I couldn't be sure.

Q In your opinion, is that shoring that is shown under those cases?

A Yes. It gives me every indication that --

MR. SHIELDS: Your Honor, now we are going beyond the field of expertise. The jury can examine the photographs as well as Mr. Keeler.

THE COURT: Yes, but he is giving an expert opinion on whether or not it is or isn't. That's all he is doing at this point.

MR. LASOFF: I am objecting to Mr. Testa's leading at this point, your Honor.

THE COURT: Leading is, of course, objectionable as you know, and as long as nobody objects you can do it. But when they object, then you have to stop.

Q I direct your attention to these various exhibits, 4, 5, 6 and 7, and ask you if you can tell me what these boards are under the cases shown in those exhibits.

A These boards have, in my opinion, were a fence, were a retaining cargo fence that came down with the draft of boxes.

THE COURT: What Mr. Testa wants to know, which

you haven't answered yet, I think, is this: amongst those boards are there also boards that could have been used for shoring? Do you see any of those?

THE WITNESS: Yes, the fencing and the shoring I am taking as one group of boards. The fence would be standing vertical with horizontal boards nailed to vertical uprights, and then it is liable to have been shored by other pieces of lumber or the fence could have just been stood up there and then the other palletized cargo driven in against it to chock it for the higher cases. I don't know how the fence was secured. It could have been A framed, which this is --

THE COURT: Indicating which exhibit?

THE WITNESS: Right here. This is an A frame.

THE COURT: But which exhibit? You see, it has a number.

THE WITNESS: This is Plaintiff's Exhibit number 5.

THE COURT: Turn around and show the jury how you have made an A.

THE WITNESS: This is two timbers that you cut them a little longer than the length of the distance from the floor to the overhead. You try to get it up in back of a beam up here. You take a sledge hammer and you knock the bottom

out until it sticks there because it is slightly longer. On a deck like this you'd cut it an inch longer. Now, you knock another one up that you cut just about right. You cut that an inch shorter. And that one goes up, that is the straight one, you see. You take a piece of timber and you put it in between the two of them where they are making a V and you drive it down with a sledge hammer or a heavy hammer and you have the tendency of forcing out the A frame and it is jammed top and bottom and you don't need any nails because you can't nail on a steel deck. This is one way of making a good, strong fence and support for a fence or division of cargo or to keep the cargo away from some delicate stowage or keep a certain little square of cargo from shifting. You put up these A frames.

THE COURT: This description you gave us has to do with the fence and nothing with the shoring.

THE WITNESS: Your Honor, it could be either way. The fence could be there with no shoring on it and it could also have been put in and shored and left there and then the cargo that was going against it comes a day later or a couple of hours later or the next shift or something like that. The fence could be put up, the cargo fence and the other palletized cargo piles right up against it to keep it there instead of having shores on it. Use the palletized as the

shoring. I don't know exactly how it was, but all of this wood is the type of wood that you could use for that purpose. Either to build a fence or to shore the fence.

Q When a stevedore goes aboard a ship to unload a ship, do they have to check every little nook and cranny of the ship in connection with an investigation?

MR. SHIELDS: Objection, your Honor.

THE COURT: Sustained.

Q What type of investigation or inspection do they make, sir?

MR. SHIELDS: Objection, your Honor. This is such a universal thing, such a difficult thing, there must be a million ways of doing it.

THE COURT: Particularize it to this setup here. What would the longshoreman do when he is faced with this transversing cargo and this pipe and the cases up against it?

MR. LACOFF: He is talking about the stevedore company, your Honor, not the longshoremen.

THE COURT: Limit it to this particular set of facts here instead of the universal question.

MR. SHIELDS: Your Honor, I object to that because we had the safety man who says that he actually made the inspection 7:30 the morning before.

THE COURT: It may or may not be that that inspection

was a good one or the proper one. That is what he is trying to find out from this witness. Do you know the question now?

THE WITNESS: Yes, I do.

THE COURT: A man goes down who has this job, safety man or whatever he is, making an inspection for I.T.O. and he's got this kind of a cargo, this kind of pipes, this kind of a setup, what does he do?

THE WITNESS: Your Honor, the man who goes down is the hatch boss. The safety man does not generally go down the hatch. He is at the beginning of the ship --

MR. SHIELDS: Your Honor, again I object. Generalities are not applicable here because we have testimony that the safety man went down. And although he doesn't generally, I think it should be restricted.

MR. TESTA: I will withdraw the question.

Q Mr. Keeler, if I told you that the chief mate on the Green Port testified that it was part of his job to supervise the work of the longshoremen to see that if he discharged the vessel properly, would you agree with that?

A I agree with that as far as the safety of the ship and the safety of the cargo is concerned.

Q If I told you that he testified in connection with that job that they have a third mate on duty to see that

they discharged the cargo properly, would you agree with that?

A Yes.

Q If I told you that the chief mate on the Green Port said that if he or the third mate had seen any activity in the cargo hatch which he considered improper or unsafe that he would have stopped the longshoremen from conducting those activities, would you agree with that?

A Well, that I agree with that, but that is a radical procedure. He would have to see something, you know, pretty bad to stop work.

Q But if he did, if he saw something that he considered improper --

A Yes, he's got the power to do it.

Q So then would you agree with Captain Wheeler in the final analysis that stowage of cargo is the responsibility of the ship, would you agree with that?

A Yes.

Q And that is what the mate is there for, would you agree with that?

A The what?

Q That is why the mate is there?

A Yes.

MR. TESTA: Thank you.

MR. LASOFF: Does your Honor want us to go?

THE COURT: Whatever order you want to assume is all right with me.

CROSS EXAMINATION

BY MR. LASOFF:

Q Mr. Keeler, would I be correct in stating that your highest experience at sea was as a junior deck officer?

A Yes.

Q That nearly all of your experience with stevedores or with shipping companies was only with the stevedoring end of the business?

A I didn't get the last part of that. What to do with stevedoring?

Q Your work dealt with the loading and discharge and cargo operations rather than with the running of ships, did it not?

A Oh, yes. Operation.

Q So you had a very limited time at sea and your knowledge of masters and chief mates and cargo mates' duties is limited, is it not?

A I have been dealing with them for 40 years, in every aspect of shipping and stevedoring.

Q How long were you at sea in those 40 years, Captain?

A I have been at sea off and on, making trips, short trips and --

Q I am talking of at sea as a seaman or an officer. How many years was that?

A Not very long. About two and a half years.

Q Two and a half years in 1932, I believe you said?

A What's that?

Q You went to sea in 1932 or something or other?

A Yes.

Q And you left in 1934, 1935?

A Well, I didn't actually leave that way. I came ashore in the winter and I went back to sea the next summer.

MR. LASOFF: If your Honor please, the answer calls for a yes or no answer.

THE COURT: What he is indicating is that there was a short gap but he went back again. You want the total service.

Q When was the last time you sailed as a seaman in any capacity?

A 1934 or the end of '35.

Q So that is approximately 40 years, perhaps?

A Yes.

Q Maybe we can eliminate certain things. When a ship is stowed, a ship is always stowed to encounter the worst

possible conditions, is it not? You have to presume there are going to be storms and hurricanes?

A No, sir.

Q It is not.

A The worst possible conditions at sea is a typhoon in one ocean and a hurricane in our ocean and it is impossible practically to stow every vessel that sailed figuring that they will encounter that condition. You make a calculated guess as to the time of the year, the course, the ocean track that the vessel is going to take, how it is loaded, how high it is, how deep it is, what kind of cargo she's got, how valuable her deck cargo is and how valuable it is. You make a whole series of experience judgments. But you never shore a ship every time you load it so that that ship could go through a typhoon. I have seen cargo on a ship --

Q Can we withdraw typhoons and hurricanes?

A All right. You don't -

Q We'll withdraw typhoons and hurricanes. But winds of 40 to 45 knots, a ship is always loaded to encounter that, stowed to encounter that?

A 40 knots don't bother a ship.

Q The ship is stowed so that doesn't bother the ship at all, is that right?

A No, 40 knots is nothing.

Q Is a ship stowed so that cargo is not supposed to fall on top of people or on top of other cargo?

A Can I have that again, sir?

(Question read)

A I would say that's right, yes.

Q And if cargo falls without anybody changing the stow or touching the cargo, is that a proper stow?

A That is a difficult question. You say if somebody changes the stow, when? When they are discharging or during the course of the voyage or after it is originally stowed in the other port or what?

At any time from the time a voyage commences until the cargo is taken off the ship, is it supposed to fall down?

A No, it is not supposed to fall down.

Q And if cargo falls down without being removed, touched or dislodged by anything, was that a proper stow?

A No, that wasn't.

Q And would the responsibility for the stow of that cargo that fell be on the ship and the officers of that ship?

THE COURT: That is a legal question.

MR. LASOFF: Yes, your Honor.

THE COURT: You can cross examine him, but he is not a lawyer and I will not allow him to give a legal opinion.

Q Mr. Keeler, you spend a great deal of your time in

your marine consulting business sitting around courtrooms and testifying, is that correct?

A In what period of time.

Q You were here all day yesterday and all day Monday and all day today?

A Yes.

Q And it is your custom to be in courtrooms when a case that you are involved in comes up, isn't it?

A Can I have that again? I don't understand that.

Q You spend a great deal of time with lawyers?

A No, I don't.

Q You didn't spend the time here for these three days with lawyers?

A All right. I didn't spend any time last week in a courtroom.

Q How much of your time on a whole would you say you spend working for lawyers or with lawyers?

A I spend a lot of time on different cases. In fact --

Q Captain, I asked you a direct question. I don't care what you do otherwise. I want to know how much time you spend with lawyers or working for lawyers. Not what you do anything else.

A I would say I spent at the present time, the last

year, about 75 percent of my business time is spent on these problems that we are talking about.

Q You heard Captain Wheeler testify today, did you not?

A Yes.

He is a marine expert, a consultant like you?

A Yes.

Q His opinion was almost diametrically opposed to you, was it not?

A I can't hear you, sir.

Q His opinion was almost diametrically opposed to yours?

A No, it wasn't.

Q You heard him say you didn't need a platform to load these cases one on top of the other, that the level platform would only make it more difficult, you heard him say that, didn't you?

A No, I didn't hear him say a level platform --

Q Did you hear me ask him whether they should have built a platform over this cargo of pipes before putting the cases on top of them?

A What do you mean by a platform? A dunnage platform of wood or to get carpenters in there to make a timber platform?

Q I mean a catwalk or platform that fits over the

pipes that is fastened to the bulkhead of the ship.

MR. SHIELDS: I object, your Honor. There is no such testimony as I recall of this type.

THE COURT: There is some questioning of dunnage being put down first. I think there was a question, too, about a platform, but it was never described. But that is the jury's recollection. They will be guided by their own recollection. In any event, you don't agree with that treatment of it?

THE WITNESS: Your Honor, you don't go around the ship building real timber platforms with carpenters and uprights and corner pieces and shores underneath and platforms all over the place. You couldn't do it. But you can by taking loose dunnage and blocks of wood shore and block a nice little bed, and you don't make the platform continuous. You block up a portion here. You are going to support that case in three places. You make a nice level place here. One a third of the way up, one another third and one on the very end. And you have four sets of supports. No matter what's in those sets of supports, they can be rough or uneven like this pipes, but put the skids in there and get them well blocked up, then put the cases on top of them and then you are starting flat, level and clean. Then you can go right on up. But you don't get a carpenter and have him saw legs and nail the legs

on and have a timber platform. You just don't go to that trouble.

Q It costs too much money, is that the reason you don't go to the trouble?

A What's that?

Q It costs too much money?

A Well, it costs money and it takes time. You'd never get the ship loaded.

Q It takes time and it costs money?

A Yes. And it isn't necessary.

Q It's not?

A To do a safe and workmanlike job, a good job that will take that cargo safely to where it is going, you don't have to do it.

Q Did you hear the safety man from I.T.O. just testify to the hundreds of accidents that he was involved in, that he investigated?

A The what?

Q The hundreds.

A The hundred what?

Q The hundreds of accidents that he personally investigated at Bayonne, New Jersey.

A Yes.

Q Is it your job to take the cargo safely or to see

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that the seamen and the longshoremen are safe as well?

MR. SHIELDS: Objection, your Honor.

THE COURT: Sustained.

Q Mr. Keeler, did you hear Captain Wheeler say that it wasn't necessary to support this cargo by anything more than a lateral support from this palletized cargo?

A Yes.

And you disagree with that?

A I would have to hear his answer. Somebody would have to tell me what he said.

You were just asked by Mr. Testa whether or not the fact that this cargo was tiered in with palletized cargo would keep it in place if the palletized cargo was eighteen inches away. And as I recollect your answer, you said no. Isn't that a fact?

A If the palletized cargo was away, it would not support the other cargo. It's got to be snug up right to those cases to support them. You can't have it out -- you can't have it out two foot or three foot and expect it to support the cases. The cases will fall right down. So I would agree with that answer.

Q Mr. Keeler, would this be a correct statement, that in discharging a ship the ship's only interest is time and money?

A Oh, no --

MR. SHIELDS: Objection, your Honor.

THE COURT: He said no, so we'll let it stand at that.

Q Do you know of any reason why this cargo should have fallen without being touched?

MR. TESTA: I am going to object to that, your Honor. That is impossible.

THE COURT: Sustained. He hasn't been called as a fact witness here at any time.

Q Mr. Keeler, is it a fact that you have never been on board the Green Port?

A Do you know what her prior name was? I don't know what her prior name was. I don't think Green Port was the name she was built under.

Q Regardless of what her name was, you are not testifying as a fact witness, you don't know anything about the facts of this accident except what you heard in court these days, is that right?

A Yes.

THE COURT: We will take about a five-minute recess.

Please don't talk about the case. We will call you back in about five minutes.

(The jury left the courtroom.)

(Recess)

(In the courtroom in the absence of the jury.)

THE COURT: In the matter of the subpoena, would you step up, please.

(APPEARANCE: Francis V. LaRuffa, Regional Solicitor, United States Department of Labor, 1515 Broad, New York, New York, by Stephen B. Dubnoff.)

THE COURT: The Court has before it a subpoena with a check which has been marked Court's Exhibit 1, directing J. Frank Morse, United States Department of Labor, to appear with all records of investigations including photographs and reports pertaining to the accident of Patrick DeMauro aboard the SS Green Port on March 31, 1971, at the U. S. Army Military Ocean Terminal, Bayonne, in room 1105, this room, before the Court. Would you tell me when this was served on you?

MR. DUBNOFF: Your Honor, to the best of my knowledge it was served on the area director of the Occupational Safety and Health Administration, Mr. Nicholas DeArchangel, last Friday. It was then brought up to the solicitor's office that I am from, Friday afternoon. At that time I called Mr. Testa to inform him that we intended to move to quash the subpoena but we noticed it was subject to actual call and that since Mr. Morse's duty requires him to make

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inspections pursuant to constitutional mandate, that he let us know when he would be needed. He informed us Friday afternoon that we should have around 24 hours notice. I received a phone call this morning at ten o'clock from an associate of Mr. Testa informing me that I should be here at one o'clock with Mr. Morse. I then called the area director, Mr. DeArchangel, who informed me that as of yesterday afternoon since they were not informed that Mr. Morse was needed today that they had sent him on inspection --

THE COURT: Is that the only objection?

MR. DUBNOFF: No, that is how we are here now, your Honor. The objection is to compel compliance safety and health officers to testify in private litigation would substantially impair the functioning of the Occupational Safety and Health Administration and, in fact, would reduce the Congressional mandate to provide a safe working place for American workers, in that every time there was an accident these compliance safety and health officers would be required to come in and testify in private litigation. It should be pointed out to your honor if I might that we do have procedures under the Freedom of Information Act where had the counsel for the third party subpoenaed or inquired as to the report in advance, certain parts of it, of course, are permissible to be disclosed. However, this is the second time

within a year that the same law firm has waited until the day of trial before they subpoenaed a witness or a potential witness. I preface my statement by saying that the area director has 22 compliance officers to cover the entire state of New York and New Jersey.

THE COURT: Have you got available those portions of the report which you say you would make available to him?

MR. DUBNOFF: Your Honor, I received the report this afternoon for the first time from the area director, Mr. DeArchangel, who is sitting here right now. I just skipped through it. The one thing I can tell you right now is that the compliance officer did not witness the accident and that what we normally do not give up is opinions that he received which were received from others, which is all this is. I will be happy to go in-camera with your Honor and have him take out the part that he feels is necessary.

THE COURT: Who takes out the part?

MR. DUBNOFF: We would object to especially the conclusion, but if your Honor feels that is disclosable under the Title 8, you would be the final arbitrator, sir.

(Handing)

THE COURT: Where did you say the conclusion is?

MR. DUBNOFF: It would be on the second page, your Honor.

(Pause)

THE COURT: Where is the director you are talking about? Would he have any objection to the first page being shown to him?

MR. DE ARCHANGEL: I haven't reviewed it, your Honor.

THE COURT: All the opinions are on the second page. Do you want to look at it?

(Pause)

THE COURT: Bring the jury in. I will excuse them at this time and we will continue on tomorrow with the jury.

(The jury entered the courtroom.)

THE COURT: You can just stand there because we are going to excuse you at this time. Please don't discuss the case in the meantime. We will continue on tomorrow morning at ten o'clock. Please return at ten o'clock. I have some other business to take care of which doesn't concern you, so rather than have you wait here and then tell you to go home, you will at least get a ten-minute start.

(The jury left the courtroom.)

MR. DUBNOFF: If your Honor please, we would have no specific objection to paragraph one and two on page one, but the rest, of course, we would. Especially in view of the language in the second line of the third paragraph.

THE COURT: I am going to rule in this fashion. I am going to quash the subpoena because I think that is more important than the other aspect of this case. The reason why I looked at this was to satisfy myself that there wasn't anything in here which would be of help to the I.T.O which was legally admissible. Everything in here is absolutely hearsay, as far as I see it. This fellow never saw anything, he wasn't there when the accident happened, he doesn't know what the conditions were when he went there. And to involve the government coming in in all these cases and starting to become a party to them, I think it would diminish their effectiveness for the purpose for which they are intended. I have read Judge Weinfeld's decision in a case which is parallel with this one in many respects although it doesn't go right down the line. I am aware that he made that decision in that case alone. But he did that because he felt he hadn't had an opportunity to brief the question nor was it briefed to them. I feel very strongly about it, however, that the one part of the decision which I heartily join in, namely that this department would have nothing to do except going around and testifying in these cases with the small field force that they have, et cetera, that it would be ludicrous, in effect we would be interfering with what the Congress intended in this kind of investigation. I don't find

it to be within the spirit of the Information Act. I, therefore, with an exception to I.T.O. quash the subpoena.

MR. DUBNOFF: Thank you very much, your Honor.

THE COURT: Give them back the check. We will adjourn until tomorrow at 10:00 A.M.

(Adjourned at 4:55 P.M. to February 28, 1974, at 10:00 A.M.)

PATRICK DE LAURO

vs.

CENTRAL GULF SS CORP.

72 Civ. 636

vs.

INTERNATIONAL TERMINAL OPERATING CO.

February 28, 1974
10:00 A.M.

(In open court - jury present)

P A U L J. K E E L E R, resumed.

CROSS EXAMINATION CONTINUED

BY MR. LAJOFF:

Q Mr. Keeler, I show you these photographs. I want you to look at the pipe. Not the cases, the pipe. Underneath that stow of pipe is there dunnage?

A Is there what?

Q Is there dunnage?

A Where?

Q Underneath the stow of pipe.

A Underneath the stow of pipes -- there doesn't appear to be, no.

Q Should there have been?

A It wouldn't be necessary.

Q Those bundles of pipe, they are banded together, are they not?

A Yes.

Q And even when they are banded together those pipes move due to vibration of the ship, do they not, inside the bundle?

A By move, they change shape, yes.

Q By change shape, they rotate, do they not?

A By moving they change shape. Not that they move from here to there.

Q No, but the individual pipe in the bundle turns slightly?

A The bundle is round maybe when it goes in and from motion of cargo over it, especially heavy cargo that is not bundled, will change the shape of those bundles, and even if they were flat when you put them in there, they are very well liable not to be flat later on.

Q I want you to assume that when this ship came in, for the moment, that there was no chocking, no fencing, no bracing, that the cargo be block tiered by a stow of cargo along the after end of the cargo fence running athwartship right up to the pipe, do you understand me so far?

A That the cargo was blocked --

Q There was palletized cargo running fore and after alongside that bulkhead between four and five and this came right up to the pipe on the offshore side.

A The cargo cannot run fore and aft --

THE COURT: He wants you to assume that it was athwartship, the palletized cargo was cross ship until you came to the pipes and it was right adjacent to it.

THE WITNESS: All right.

THE COURT: Do you understand that?

THE WITNESS: Yes.

Q I want you to further assume that when the longshoremen went down into the hatch they started to discharge this palletized cargo from the offshore side towards the inshore side and that the first draft of palletized cargo that was taken out was the one next to the pipe, then after that the one next to that, next to that, next to that and next to that. When that first draft of palletized cargo next to the pipe was taken out, how would that affect the stow of cases on top of the pipe?

(No response)

THE COURT: Would it remove the lateral support?

Q We are assuming that there was no chocking or bracing.

A If the cargo fence that was holding or if there was no cargo fence it would remove some lateral support, yes. If there was a fence in there and the fence was holding it wouldn't matter.

THE COURT: But he told you to assume there was no fence and no chocking and nothing else?

A It would remove the lateral support, yes.

Q I want you to further assume that this was done about 8:30, the first case, the first tier of palletized cargo was taken out. And about nine o'clock when Mr. DeLauro was hurt, between eight and twelve additional drafts of palletized cargo had been taken out, and that after this these four cases fell, do you understand?

A Yes.

Q When that lateral support was removed, what should the ship have done to support that cargo?

MR. SHIELDS: I object to the form of the question, your Honor. What should the ship have done or what should the stevedore have done?

Q What should the ship or the stevedore have done?

MR. TESTA: If your Honor please, the question was put to the witness first as to what the ship should have done. I don't see anything wrong with that.

THE COURT: You have no objection to that, right? The only trouble is that Mr. Lasoff is withdrawing the question and substituted another one for it. I would suggest that you find from him what his opinion is as to what should be done and who should do it.

What should have been done when that lateral support was removed and who should have done it?

A Well, if when the lateral support was removed, the last place that was against the pipe and the cases --

THE COURT: Wait a minute. Can you hear today?

THE WITNESS: Yes.

THE COURT: You don't have trouble hearing, do you?

THE WITNESS: No.

THE COURT: That is absolutely a fact which has not been given to you. The facts given to you are very simple. There is the pipe, the four cases, the transverse cargo, palletized, coming to the cases and the pipe. And they removed the nearest one to the pipe first, and they went over eight or nine or ten of these palletized pieces of cargo. What do you do at that point as far as the cases are concerned and who should do it?

THE WITNESS: When the first one is -- when the first palletized draft is taken out it does remove, if I am to assume that there is no fence in there, it does remove lateral support from the side of those cases, and if the cases look as if they need support it would be the stevedore's job to do something about it.

THE COURT: What could he do?

THE WITNESS: What he could do is immediately go in with the lift truck and take off the top case with the men not being exposed to the three other lower ones should they fall out, or the lift truck on cases of this weight, even heavier, the lift truck could have taken two or three of the cases, got them on their forks, left one on top of the pipe. That wouldn't go anywhere, move them out and lower them to the deck, then pick off the top one and put it in the square of the hatch to take it out.

Q Could the driver have braced or chocked that cargo?

A He wouldn't chock it, no. When that pallet left, if it looked unstable or dangerous to him, he would drop that draft before he took that draft all the way away from the stow and into the square of the hatch to be hooked up. He'd just pull it out and drop it and then he'd go back and lower those top cases down. He'd come back then, take the palletized draft, put it in the square of the hatch to let it go out.

Q Would an experienced seaman or stevedore look at this stow, four cases on top of round pipe, know that that was unstable?

A I imagine if they fell the way they did fall --

Q I don't want to know what you imagine. I am asking

you a fact question. Change it to should an experienced stevedore or seaman --

A If they were unstable enough to fall he would have seen something unstable about them.

MR. LASOFF: Repeat the answer.

(Record read)

Q Assume for the moment that they did fall. Should you have seen something unstable about them?

A Yes. It was definitely -- they were stowed defectively.

Q For the last 40 years you have been doing a lot of work for stevedores, correct?

A Yes.

Q And in a working hold gang, a gang that works on a ship as contrasted to extra labor or checkers or things like that, there are basically three categories of men, are there not?

A In a gang?

Q Yes.

A Yes.

Q This would be, aside from the hatch boss, the foreman of the gang, there would be dockmen, deckmen and holdmen, is that correct?

A Yes.

Q Tell us the duties of a holdman.

A Well, the duties of a holdman are when a stevedoring gang first comes aboard a ship and is assigned to a certain hatch --

Q I just want to know his work. I don't want to know how he does it, just what type of work he has to do.

A When he first comes aboard the ship he assists the deckmen in taking off tarpaulins that covers the hatch. As they are rigging the decks, he goes down into the ship to the first deck beneath the weather deck or the top deck and he starts to strip any covers that are down. There is an opening down there just like he would have an opening in the floor and across that opening where the cargo is going to pass down and out there is beams, steel beams go across at various intervals of five to eight feet and there is wooden covers and pontoons and steel covers guarding that open area or covering it up. While the deckmen are opening up the level above or the weather deck, the holdmen go in and they start to open up the deck beneath it as much as they can by doing hand labor. Once the weather deck is open they then assist in hooking up the beams and pulling the beams out, storing them over to the side of the deck to make that opening clear so that now that the cargo comes through the opening in the weather deck it can go right down through one

of these 'tween decks and land in the hold where they want it. After they strip that deck they then go down the hold and they wait there for number one, the hatch boss or sorting checker to tell them what cargo to start on. They also wait for hatch boss to send in the discharging gear to them. Now they might be using nets, they might use wire straps, they might use palletized bridles. That comes into them in one or two drafts. They then break up, there is eight of them and they go four on each side, four on the inshore side of the hold and four on the offshore side, and each team works separately in building a draft. The first draft that is full and ready to go out, that draft is hooked up and goes out and another set of empty gear is returned to those fellows. In the meantime the other four men are building a new draft. When the gear comes back the four men who belt the first draft, they take the gear off and commence building their second draft. The hook is transferred across the hatch, the full draft of the other team now is hooked up and that goes out. When that hook comes back that gives them a set of empty gear. And they just keep this up side by side. First out and second out and then third out and fourth out.

Q You are referring to a discharge, correct?

A Yes.

Q When a ship comes in for discharge, isn't it a

fact that the cargo in the hold is uneven, different levels, the cartons are not all the same size?

A Yes. All the time. Very frequently. It is a highly unusual thing to get a homogeneous load of all one size cartons, packages, cases. It is very seldom you see that.

Q When you say building a draft you mean the longshoremen actually picking up these cartons or cases, putting it on a pallet or in a net and then having it hooked up and sent out, correct?

A Yes.

Q This is manual labor?

A Yes.

Q With the deckmen you have basically winch operators and you have a gangwayman or relief man, and since 1968 you basically have three deckmen in a gang, is that correct?

A Well, one of them is a signal man.

Q One of them is the gangwayman or signal man, and one of them is the relief man who relieves the signal man or the winch operator?

A Two signal men.

Q Isn't it a fact that since 1968 under the terms of the contract there are only three deckmen now where there used to be four?

A Yes.

Q You have one winch man, one signal man, one relief man?

A That's right.

Q Basically, there are two winches that are operated at the same time, are there not?

A Yes.

Q One of them is known as the Burton winch and one is the up and down?

A That's right.

Q The controls on most standard ships are close enough so that one man can operate them one with each hand?

A That's right.

Q He operates these in a standing position, does he not?

A He what?

Q In order to operate these he is standing, he has to see over the coaming into the hatch and see the signal man?

A Not in all instances. Sometimes. I'd say 50 percent it is that way, yes.

Q As a matter of fact there is a specific regulation that the longshoremen cannot attach a board to the levers of the winches so they can work sitting down, is there not?

A Unless it is a fitted handle, unless it 's a fitted, properly fitted handle supplied by the vessel.

Q When these winch operators operate winches all they are operating are the controls which are usually on or next to the coaming, correct?

A Usually, 50 percent, yes.

Q The electrical motors, of course, are not near the coaming, and the drums, they are alongside, correct?

A Well, they can be up on the mast house, they can be down on the deck.

Q But this has nothing to do with the winch operator's work itself?

A No.

Q The coaming is -- would I be correct in describing the coaming as a metal rim, a little lower than this, around the entire square of the hatch?

THE COURT: Indicating the jury box.

Q Indicating the jury box rail.

A Yes. The opening that is in the deck, there is a steel plate fence or rail just like that, is built on the four corners, comes right around.

Q The signal man or gangwayman, as he is sometimes called, works in a standing position all the time, correct?

A No.

Q What does he do?

A He is there strictly for the reason that when a winchman is running the winch, provided he is in a position to see down the hatch, he can leave that winch position to look where the men might be under a wing where he is standing or under the forward wing, and that is the exact purpose or half of the exact purpose of the signal man. The signal man is able to move around this fence that we just described and he can see where the men are working, he can see the men behind a tall case which the winchman could only see the men on this side of the case, and these men may have their hands clear of two wires or something and be clear on hoist. The fellows in the back may have their hands on the wire, exactly through the case. But the signal man moves along the deck, he can get himself in a position where he can see all the men, and then signal the winchman at what time to come ahead with the gear. And furthermore, the winchmen frequently on a light ship, because of the side of the ship's height and the low neck of the dock, he cannot see close by the side of the ship on the string piece where the draft has landed, and the signal man, the minute he picks, he gets everything straight in the hatch and safe and he makes his pick out of the ship, as the draft is coming up and before it traverses over the deck, he walks over to the rail of the

ship and looks down on the dock and makes sure that everything down there is safe for the draft to come out and then land on the dock. So the signal man moves. He's got a moving signal job.

Q With regard to the dockman, is his work basically the same work as a holdman, except that on -- well, tell me in what way his job differs from a holdman, aside from climb ladders.

A In today's stevedoring, 80 percent of all the cargo is palletized, and once it is put on a pallet, which is a board skid of two levels and the cargo is packed on it, and then the lift truck comes along, gets its blades between the upper face and the lower face of this skid, brings it out, it is hoisted up, put on the dock, another fork-lift truck from the dock comes in, grabs it from the other side, lifts it up, runs it on the dock and places it on a pile. There is nothing to do for the holdmen in that cargo except, well, maybe clear a door. If a door had some dunnage or debris in it they'd sweep it out or shovel it out and get the place clear where this cargo is going to go. But the cargo stays on the pallet until the truck comes in after the ship has gone away, to take delivery of the cargo, and then extra labor on the pier do that. The ship men have nothing to do with it. So the holdmen, except if you are discharging cargo or

or loading cargo that is not palletized, then they do about the same job that the holdmen would do in the hold, because the cargo has to be put on some piece of conveyance to be brought from either the transit shed or up in the farm or the head house and out to the side of the ship to where the ship's gear can get ahold of it to lift it in. So the holdmen have to prepare this cargo, rig it with some kind of wire or gear or something to get it to the ship's side.

Q You mean the dockmen?

A The dockmen.

Q Even with palletized cargo, sir, you have to use bridles to lift this palletized cargo?

A Yes.

Q And these bridles are basically much bigger than I am, but they come down in a V with two metal bars, is that correct?

A Well, they have four legs of wire, of half inch diameter wire and on the bottom there is a steel bar or a steel pipe that is six inches wider than the four foot widths of the narrow widths of the pallet, so that the bar sticks out six inches from the side of the pallet and the wire legs come down and grab that bar with shackles. So really what you have, you have a four-legged bridle of four pipes just like my arms holding together. They come down over the draft. And one

from one end of the draft reaches over and he grabs one pipe. A fellow opposite him on the other end of the draft reaches over and grabs the other pipe. They separate the two pipes and the signal man then tells the winchman to come back easy, and they lower the pipe down until the pipe gets on the ground, and there is a space between the upper floor of the pallet and the lower floor of the pallet where this bar goes in. Once the two bars are in those spaces the winchman then, after getting a signal from the signal man, gets tight, he does it with a physical signal. He just tells the winchman set tight. And the winchman then just tightens the gear. Doesn't lift it. And that draws the two bars, it signals them into the end of the pallet. When he knows it is snug and it is leading pretty plumb under the boom he then gives the winchman the signal to go ahead. The minute the draft starts up he leaves the rail and walks to the hatch coaming to watch it go down the hatch.

Q In order to get these bridles in, do the dockmen have to bend down?

A To what?

Q To get the bridles into the pallets, do the dockmen have to bend down?

A Normally you don't have to bend down, but there are times when you do.

Q With regard to the winch operator, sir, a great many winches are built on winch platforms which you have to climb a ladder to get to, is that correct?

A Some of them are on mast houses, correct.

Q The main deck of a ship and the dock itself, aren't there always obstructions and cargo and uneven floor in many of these places?

A If there are obstructions there is a mandatory safety rule in our business that says you must have a three foot clear walkway on one side or the other of the vessel or if you have a total deckload you must have a catwalk going over the deck load.

Q But even the walk is not built on a level surface, it is built over cargo, correct?

A It is built of wooden planks.

Q Over cargo?

A Yes.

Q And cargo can be of different heights even on deck, is that correct?

A Yes.

MR. LASOFF: No further questions.

CROSS EXAMINATION

BY MR. SHIELDS:

Q Mr. Keeler, on direct examination you testified

that ships' officers have many duties, there are only a few officers that can't get around the vessel and be at every spot at any one time, and all they have to do is have a general idea of the cargo, and the officers, therefore, leave the loading to the stevedores, is that a correct statement of what you testified to on direct examination?

MR. TESTA: Your Honor, that is not a question, that is just a restatement or rehashing of his testimony.

THE COURT: Sustained. If you intend to have him go into that you have to have a Q and A similar to the deposition that you had here.

MR. SHIELDS: The only purpose of that question, your Honor, was the recess --

THE COURT: He can remember what he said. Just ask him the question which prompted that answer.

Q Is it the custom and practice aboard United States flag ships for the officers to leave the loading of cargo to the stevedores?

MR. TESTA: Objection to what's custom and practice on flag ships, your Honor. He is not qualified.

THE COURT: In the circumstances of this case, with the Green Port coming in and under the circumstances of leave on ship, et cetera, what does the personnel of the ship do at that point?

THE WITNESS: When the ship first comes in they are busy with many things. There are more officers around, until they set their watches up and they are taking care of the ship's business, they are rigging the gangway, they are adjusting the lines after the initial putting out of the lines. The higher officers, like the chief mate, he is dealing with the stevedore as to any idiosyncrasies of the stow. He may have something dangerous. He may have something very valuable stowed in a stateroom that is unoccupied, under lock and key. And the stevedore is telling him unusual things that he has contemplated for this loading. He will tell him, I have got all the things I have got that are heavy. He will tell him all the things he has that are big. He will tell him all the things he has that are dangerous.

MR. TESTA: I object to this as not responsive to the question. He was asked what the activities of the ship's officers are.

THE COURT: He is telling us who he has the activities with. He is talking about ship officers and stevedores talking to each other.

MR. TESTA: Yes, but it is not responsive to the question as to what the activity of the ship's officers are.

THE COURT: Mr. Testa, can you speak in a vacuum? He is telling him what the ship officers do and who they do

it with. It is perfectly responsive to the question. The objection is overruled. It comes to the point when they have told each other everything they want to do. It is like a watch officer relieving another watch officer on board ship, isn't it?

THE WITNESS: That's right, your Honor.

THE COURT: They tell him what's up at this point. Some of them leave the ship, don't they?

THE WITNESS: Right. Some of them have shore leave and the mate will assign one of them to cargo watch for that period, or if it is a large ship he may assign a lower mate like a third mate forward and a cadet aft, or an apprentice aft. And they have the watch maybe from four o'clock to midnight, about eight hours. And he arranges for another one to relieve him at midnight until eight in the morning, and he is back at eight o'clock.

Q Normally that cargo officer has no business down in the hold, does he, during the discharging operations?

A No, it is an unusual thing that would bring a ship's officer to the hold. They go in the hold, yes.

Q Because this is the province of the longshoremen, they are experts in this area, correct?

A Well, there is reasons why a mate goes in. But it is not -- he doesn't stay in the hold.

Q You have been here now through the entire testimony of this trial. Have you heard anything described, any condition that would have required a ship's officer to go down below?

A Yes. I very much do know why he should be down there. When he stowed those four cases one on top of the other in a single tier, knowing that that pallet would come out of there, and I don't know whether I am supposed to assume there was a fence in there now or not, a retaining fence, but regardless of whether there was a fence or not --

Q Wait a minute, now --

MR. TESTA: Let him answer the question, please.

MR. SHIELDS: He is putting in facts that are not in evidence.

MR. TESTA: If your Honor please, he was asked a question and I think the witness should be permitted to answer it.

THE COURT: You didn't think that a minute ago, did you?

MR. TESTA: No, but I think it now. When a witness answers a question, he should be permitted to answer it.

THE COURT: I am going to put a stop to this because this witness goes on and on in answering questions, and he could be here for two days. I think there should be some time when he

answers the question in a more terse fashion.

MR. TESTA: He was. He was answering the question precisely --

THE COURT: Did I interrupt you, Mr. Testa? You think he does, you have made your objection, and I overrule the objection.

MR. LASOFF: Your Honor, may we have the question read back and have him give a responsive answer to the question?

THE COURT: That was a why question, and when you have a why question you are in trouble. I pointed that out before.

Q Mr. Keeler, assume that a vessel came into the port of Bayonne and in the lower 'tween deck of number four hatch, there were pipes stowed on the offshore side and on top of the pipes were four heavy boxes of cargo, assume further that athwartshipwise those four cases were supported by other cargo which was stowed all the way across the vessel, and assume further that towards the forward end of the cargo there was bracing run up to the ceiling as you, yourself, have described. And assume that a safety man from the stevedoring company went down, saw that, and approved it. Under those circumstances would there be any necessity or any reason for a ship's officer to go down into that number four hold hatch,

ship's cargo officer?

A At that time, no.

Q Mr. Keeler, you seem to have done just about every job on a dock or on a pier. Are there any other jobs for longshoremen who can't climb ladders or bend?

A Yes, there are many jobs on piers and terminals.

Q Could you tell us what some of those jobs might be?

A Well, there is a clerk's job, there is a checker's job, there is dock sorters, there is extra labor jobs, there are gear men, there is a safety man now on every vessel --

Q The safety man apparently has to go up and down ladders. I am talking about jobs which would not require going up and down ladders or strenuous work?

A He could be a checker or clerk, and he wouldn't have to climb anything by being a checker or clerk or --

Q Is there a job known as a sorter?

A A dock sorter.

Q Timekeeper?

A Well, if he had the ability he could be a timekeeper. That comes under the clerk category. If he was just dock extra labor, and it is a more favored job even than a longshore ship job, because we are working when the ship isn't there, longshore gangs work only when the ship is there,

If you hit extra work on the pier, which is what we called star jobs, those gangs get more money than a regular gang.

MR. CHIELDS: No further questions.

REDIRECT EXAMINATION

BY MR. TESTA:

Q Is there also a job known as a sweeper?

A Yes.

Q Do you have to do any standing or walking or bending, or does he do it on a vehicle of some kind?

A If the pier has a machine he sits the whole day. He has nothing to do but sit and drive.

Q All he does is sit on his vehicle and ride around the dock and sweep up, is that right?

A That's right.

Q Is that one of these extra labor star jobs that you were talking about?

A That is one of them.

Q So far we have clerk's job, sorter, timekeeper, sweeper, these are all jobs that a man can do that do not require excessive walking, standing, bending, lifting or squatting, is that right?

MR. LASOFF: Objection, your Honor. The only question asked before this was climbing ladders.

THE COURT: Now he is asking another one.

MR. LASOFF: He is asking a leading question of his own witness. This is his witness.

THE COURT: All right. Suppose you put it in a nonleading form. What are the requirements for all of these jobs that Mr. Testa has been enumerating here?

THE WITNESS: The requirements for those jobs are not to climb ladders, your Honor.

Q How about excessive walking, bending, standing or lifting? Are they involved in any of these jobs?

A You'd have to take them. The clerk's job does not involve bending or walking. The checker's job would involve walking, would not involve bending or lifting. The sweeper's job, of course, that would involve sitting on a machine and steering. That's all you do. That would not be bending or lifting. Extra labor there would be some, if you were on a travel gang of extra labor that was going between the farm and the head house and the place of rest on the dock you would be walking. If you were assigned to the back of the trucks you wouldn't be walking.

Q How about sorter? That is the only job you haven't covered.

A The what?

Q Sorter.

A Well, a dock sorter would not be climbing anything.

He would not be lifting anything. He would be simply interpreting market sheets and marking up cargo with a crayon. The most bending he would have to do would be bend over a case or mark the port on it or the cubic or the weight.

MR. TESTA: Thank you.

THE COURT: Wait a minute, Mr. Testa. Do you have an area you want to ask him about which apparently you wanted to hear as part of a continuous answer, right? Namely what was the ship officer to do if he saw a certain condition.

MR. TESTA: Yes?

THE COURT: At that time I didn't allow him to answer, but there is no reason you can't ask him that question.

MR. TESTA: All right.

Q Mr. Keeler, you were here yesterday when I read from the chief officer's deposition, were you not?

A Yes.

Q I am going to read it to you again, since the judge has --

THE COURT: No, I don't want anything. I might have forgotten what you were trying to do when I sustained the objection.

MR. TESTA: I didn't forget anything, your Honor, but since you brought it up I'd like to ask him these questions

and see if he agrees.

MR. LASOFF: He asked him on direct examination.

MR. SHIELDS: This was covered yesterday.

THE COURT: This has been done, Mr. Testa. Let me put the area that I think you wanted and you didn't ask. Suppose the ship's officer knew that the stevedore was taking the cargo, palletized cargo and removing the lateral support at that time, would there be an obligation on his part at that point?

THE WITNESS: Absolutely.

THE COURT: But he would have to know about it, right?

THE WITNESS: Well, that is one of the things that the mate should tell the watch officer. He'd say, "Hey, don't forget those tiered up cases. When they pull that cargo away, you be sure you are there."

THE COURT: That is the area you wanted.

MR. TESTA: That's all.

RECROSS EXAMINATION

BY MR. LASOFF:

Q Are checkers the same union as longshoremen?

A Checkers what?

Q Are they in the same union as longshoremen?

A They are in the same union, but they are in different

locals.

Q And a longshoreman can't work as a checker unless he joins that local or takes a test to be a checker?

A Well, when a longshoreman is injured the delegates make it easy for him to become a checker.

Q The delegates waive the Waterfront Commission's Rule?

A Yes - no, that is not a Waterfront Commission rule. That is a rule amongst themselves. They are all men who have known each other all their life and do the same work and they take care of their own people.

Q Do you know if anybody took care of Pat DeMuro to give him a job as a checker?

A He could become a checker.

MR. TESTA: How could he possibly know that, your Honor?

THE COURT: Did you hear the answer?

MR. TESTA: No, I didn't hear the answer.

THE COURT: The witness said -- read the answer.

(Answer read)

THE COURT: You want it stricken?

MR. TESTA: No.

THE COURT: All right.

Q Extra labor deals primarily with loading and dis-

charging trucks, does it not?

A Yes, I would say that. Discharging and loading trucks, both ways.

Q That is what I said specifically, discharging and loading of trucks, didn't I?

A You discharge them when the cargo is coming into the pier and you load them when the cargo is going out.

Q On a pier you have a loading platform, correct?

A Some piers.

Q And you also have a farm area?

A Yes.

Q And the farm area is much larger than the loading platform, isn't it?

A Generally.

Q And trucks are discharged both at the loading platform and the platform in the farm area?

A Yes.

Q And in order to get on board a truck you generally have to climb on top of a tailgate, don't you?

A No, the tailgate is exactly even with the loading farm.

Q There is no loading platform in the farm, is there?

A If you don't have a loading platform the checker

never goes on the truck.

Q I'm not talking about a checker, I am talking about extra labor.

A He is one of the extra laborers. The only one that goes on the truck are the fellow who are building drafts in the truck if the drafts are not already built, and the hilo machine.

Q Isn't that what extra labor on the pier does, goes on a truck and discharges it?

A If the drafts are built on the truck. The trucks come in today with the drafts built. The machine goes in, picks up the draft and brings it out, and when he hits the loading platform as he comes out of the body of the truck the checker then denotes the draft and the page is marked how many pieces are on it.

Q We have already established that there is a farm area on the pier that is much larger than the loading platform and that trucks are discharged from this farm area, so there is no loading platform, correct?

A Yes, there is. The loading platform will then pile the empty pallets to the height of the truck.

Q When you discharge or load cargo onto a truck, do you have to bend down?

A If you were making drafts, yes, he would have to

bend down.

Q And that cargo inside the truck when you go in there to take up the pallets, that is not an even surface either, is it?

A Yes, definitely is. Flat as this court.

Q The cargo in the truck is flat?

A The truck floor is flat.

Q I'm not talking about the truck floor. In order to discharge a truck you have to step on cargo, are you not?

A You are never on cargo in a truck. You work from the floor in. The truck isn't high enough to get up.

Q Don't you discharge cargo by machine, sir?

A Machines in a truck?

Q Yes.

A Very seldom.

Q Incidentally, there is no specific position of dock sorter, is there?

There is a sorter, there is a head sorter and a sorter, there is no classification of dock sorter, is there?

A Oh, yes.

Q Don't all sorters go on board ships?

A No.

Q Incidentally, isn't sorter a favored position where

you have to know somebody to get that kind of job?

A Of course some people get their job that way. Some get it with their ability, some get it through longevity. They have been checking for a lifetime. It works the same as it does as any other place in the world.

Q Only more so on the waterfront, correct?

A I wouldn't say that.

Q Incidentally, the gangs were cut from 21 men to eighteen men in 1968, correct?

A Can I have that again?

Q A longshore working gang, the gangs that work on the ships were reduced in size by agreement between the union and the New York Shipping Association, from 21 men to eighteen men in 1968?

A Under certain conditions, yes.

Q Prior to that 1968 agreement there used to be eight dockmen, correct?

A There was eight or nine dockmen as a usual rule.

Q And since that agreement there are only six dockmen, is that correct?

A Yes.

Q Isn't it a fact that when a ship is being discharged at least two of the dockmen go down into the hold to work with the longshoremen?

A Yes.

Q And isn't it a fact that on the waterfront everything is done in a matter of seniority?

A No.

Q No?

A Absolutely not.

Q Isn't ita fact that the man who has been a dockman in this gang the longest is the last one going down into the hold?

A No, sir.

Q How is it done?

A It is done by relation. Old men, fat men, young boys. They don't send heavy men over the side. They can't go over the side. They don't send old men over the side. They send the young boys over there. They send the young boys down the hold in certain instances. It is according to what the work is and where the work is being done. That is what the hatch boss is there for.

Q Do you see Patsy DeMauro? Is he a fat man?

A What?

Q Do you see him? He was a holdman.

A That's right. He was one of the eight holdmen.

MR. LACOFF: No further questions.

RECROSS EXAMINATION

BY MR. SHIELDS:

Q Mr. Keeler, the stevedores and the men, they hold themselves out to be the great experts in loading and discharging cargo, don't they?

A Yes, they are the experts.

MR. LASOFF: Your Honor, I am going to object at this point. This is improper redirect -- recross examination. There is nothing that I said about stevedores and there is nothing about experts in Mr. Testa's redirect examination.

THE COURT: I would say that that was so, Mr. Shields, unless you have some very vital point that you feel you forgot.

MR. SHIELDS: It isn't anything I forgot, your Honor. It was something that was brought up, I believe through Mr. Testa.

MR. TESTA: I don't think so, your Honor.

THE COURT: No, we have been going back and forth like a tennis match.

MR. SHIELDS: I will withdraw it. I have no further questions.

THE COURT: Is that it, then?

MR. TESTA: Yes.

THE COURT: All right. You may step down. Be careful.

(Witness Excused)

THE COURT: I think the case is with Mr. Testa at this point.

MR. TESTA: Yes, sir. At this point I'd like to offer in evidence the record from the shipping association with respect to Mr. DeMauro's earnings.

THE COURT: All right. Show them to Mr. Lasoff.

MR. LASOFF: May I approach the Bench?

THE COURT: Yes.

(At the Side Bar)

MR. LASOFF: That is what he is trying to get in?

THE COURT: No, he doesn't want that.

MR. TESTA: I want this.

THE COURT: He says that these are the papers here.

MR. TESTA: No. I am offering this. He said that he made $6,000.

THE COURT: Wait a minute. He doesn't want this before them. And I don't blame him.

MR. TESTA: Wait a minute, Judge. He introduced testimony through Mr. DeMauro that he did not get anything --

MR. LASOFF: I did not say that.

MR. TESTA: He did so. He introduced testimony that he didn't get it and in order to get it he would have to

check in and say that he was ready, willing and able to work.

MR. LASOFF: That is now.

MR. TESTA: It was then, too. The plaintiff testified that he didn't get it.

MR. LASOFF: Your Honor sees he didn't get any here and now.

MR. TESTA: When he got it in 1972, your Honor.

MR. LASOFF: That is collateral.

MR. TESTA: In order to get it he had to represent that he was ready, willing and able to work.

THE COURT: It is a collateral matter and I exercise my discretion and deny it.

MR. TESTA: I take exception, your Honor, because he's already testified that in order to get it --

THE COURT: Therefore, it is a matter of credibility, right?

MR. TESTA: Yes, but this shows --

THE COURT: I don't care whether it shows whether he did or didn't. It is an attack of his credibility, and it is within my discretion to allow it or disallow it with an exception to the third party defendant. The other part of it, I don't see any objection to it here, the earnings.

MR. LASOFF: I will put in his actual earnings because this is not correct, your Honor. I have the W2 forms.

THE COURT: I will allow those portions which I have indicated.

MR. TESTA: He testified he made $6,000 --

THE COURT: I understand. And I am telling you that is a collateral matter and in the exercise of my judgment I will disallow it.

MR. TESTA: The whole part of it --

MR. LASOFF: He said everything but the G.A.I.

THE COURT: That is what you said. Either read it into the record or make another transcript. You agree how you are going to X it out.

MR. TESTA: Can it be marked at this time?

THE COURT: Yes, I am receiving it subject to those conditions.

(End of side bar conference)

(Third Party Defendant's Exhibit B received in evidence.)

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THE COURT: Do you want to read to the jury what you say is relevant, Mr. Testa?

MR. TESTA: Yes, your Honor. This is a record of Mr. DeMauro's earnings for the year 1970 which shows for the quarter ending March 31, 1970, he made $1,193.76. For the quarter ending June 30, 1970, he made $834.10. For the quarter ending September 30, 1970, he made $1,150.61. And

for the quarter ending December 31, 1970, he made $946.45, which is approximately a total of thirty-nine hundred some odd dollars. If your Honor please, at this time I would like to read certain interrogatories propounded by the defendant to the plaintiff and the answers to those interrogatories as made by Mr. DeMauro.

THE COURT: All right.

MR. TESTA: And I'd like your Honor to explain to the jury that these are answers under oath that are made by Mr. DeMauro.

THE COURT: They are evidence just the same as the depositions were and the testimony of witnesses here. These are to be considered by you in rendering your judgment in this case.

MR. TESTA: This is interrogatory number nineteen, a question propounded by the attorney for the shipowner to the attorney for Mr. DeMauro and answered by the attorneys and signed and sworn to by Mr. DeMauro.

"19: State and describe the manner and way in which plaintiff claims his injuries occurred."

MR. SHIELDS: Your Honor, I object to the reading of this answer because it has been changed. It is not the answer as appears to have been verified by the plaintiff.

THE COURT: It was since changed?

MR. LASOFF: No, it wasn't, your Honor. It was mailed to them with that correction in it.

THE COURT: Is the one he is reading the same?

MR. LASOFF: The same as he is reading.

THE COURT: Then he says the correction is in there already.

MR. TESTA: Aren't the originals on file, your Honor?

THE COURT: I suppose they are.

MR. TESTA: If they are in the file here I suppose your Honor could look at them while I am reading.

THE COURT: No, you take the original and read from the original. I don't think you should read from a copy.

MR. TESTA: May I have the original then?

THE COURT: All right. He will give them to you.

MR. LASOFF: Here is the original.

(Handing)

MR. TESTA: Here are the original interrogatories and Mr. Lasoff has handed me the original answers to the interrogatories.

THE COURT: All right.

MR. TESTA: I will read the question again, which is question nineteen:

"State and describe the manner and way in which plaintiff claims his injuries occurred."

Answer to this interrogatory number nineteen:

"Plaintiff was struck by a collapsing cargo fence which had not been touched." That is typewritten. And then added in ink are the words: "And cargo behind the fence."

Number 20:

"State specifically what plaintiff claims caused him to sustain the alleged injuries."

Answer to number 20, typewritten:

"Collapsing cargo fence." And then added in ink: "And cargo behind fence fell on him."

Number 22:

"State specifically and describe fully each and every act of negligence on the part of the defendant which plaintiff will claim upon the trial of this action against the defendant."

The answer is --

MR. SHIELDS: Your Honor, I object to this. This is not evidence. This is merely allegations. I don't believe it is evidence and I object to it.

THE COURT: I will allow it. Overruled.

MR. TESTA: The answer to question number 22 is:

"Defendants, its servants, agents, employees, its

master, officers and crew, were careless and negligent and the vessel unsafe and unseaworthy in that they failed to supply plaintiff with a safe place to work in that they failed to supply proper and suitable and safe walking and working surfaces, in that they permitted and allowed a cargo fence to be erected in said hatch in such position and condition so as to allow the same to readily collapse and fall."

Then further down:

"In that they permitted stowage of cargo behind the cargo fence in such position and condition as to cause said fence to collapse."

Question number 24:

"If plaintiff claims the defendant had actual notice of said negligent condition referred to in answer to interrogatory number 22, then state the names of the person on behalf of the defendant who the plaintiff claims had such notice."

MR. SHIELDS: Same objection, your Honor. This is not evidentiary in any fashion.

MR. TESTA: The answer to interrogatory number 24 is:

"The defendant had actual notice of such conditions by reason of the fact that the ship came in with the cargo fence and the cargo in said condition and defendant's master,

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"officers and crew knew of the same or should have known of the same."

Number 26:

"State and describe fully each respect in which plaintiff will claim upon the trial of this action that the SS Green Port was unseaworthy."

And the answer is, 26:

"Defendant's vessel" --

MR. SHIELDS: Same objection, your Honor.

THE COURT: Overruled.

MR. TESTA: "Defendant's vessel was unseaworthy in that the cargo fence erected was unsuitable and unsafe as set forth in paragraph 22."

Number 36 --- I have to read 36 first.

"Did plaintiff report the incident herein to any officers, supervisors or personnel of International Terminal Operating Co., Inc.?"

And the answer is, "Yes."

37:

"If the answer to the above interrogatory is in the affirmative, state A, the name, address and job classification of the person or persons to whom the plaintiff reported the incident. B, the location, date and approximate hour which each such report was made. C, state who was present at

such report. D, Set forth the substance of such report; E, state whether said reports were oral or in writing."

The answer is: "Hatch boss and timekeeper."

On the day of the accident the substance of the report was that the cargo fence fell and hit me, and the cargo behind it fell on me.

Number 40:

"With respect to the allegations contained in paragraph eight of the complaint herein, specify" --

MR. SHIELDS: Same objection, your Honor.

THE COURT: Overruled.

MR. TESTA: "Specify the name, rating or otherwise identify the agent, servants and/or employees of the defendant whom it will be claimed were negligent and careless.

"B: State specifically and describe fully the manner and way in which it will be claimed the persons referred to in interrogatory number 40A were negligent and careless in failing to provide the plaintiff with a safe place to work and/or failing to provide the plaintiff with a seaworthy vessel."

The answer to question number 40 is:

"Defendant's master, officers and crew. Plaintiff does not know the names of any of these people.

"B They were negligent and careless in that they permitted and allowed cargo to be stowed behind the cargo

"fence which was not suitable, secure or proper, so that when the fence fell the cargo behind the said fence struck the plaintiff as heretofore set forth in the negligence and unseaworthiness paragraph of the complaint" I'd also like to read from the regulations, paragraph 1504, subdivision 28.

MR. LASOFF: Are you asking his Honor to take judicial notice of this or has he taken judicial notice of it already?

MR. TESTA: He's done it already. 1504.2, subdivision B, I read: "It is not the intent of the regulations of this party to place additional responsibility or duties on owners, operators, agents or masters of such vessels unless such persons are acting as employers, nor is it the intent of these regulations to relieve such owners, operators, agents or masters of vessels from responsibilities or duties now placed upon them by law, regulation or custom."

That's all I have, your Honor.

THE COURT: That is the Third Party Defendant's case?

MR. TESTA: Yes, sir.

THE COURT: Any rebuttal by the plaintiff?

MR. LASOFF: Your Honor, I'd like to offer into evidence the W2 forms of Mr. DeMauro and his wife for 1969 and 1970.

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THE COURT: All right. Show them to the defendant.

(Pause)

MR. SHIELDS: Your Honor, I have no objection to the W2 forms of Mr. DeMauro, but I don't see that there is any relevance to the W2 forms of his wife.

MR. LASOFF: I will cut it out, your Honor. They are just together. I have to sever them physically.

THE COURT: All right.

MR. LASOFF: We will sever them during the recess, because they are all on one page.

MR. TESTA: With that condition, your Honor, I have no objection to Mr. DeMauro's earnings record.

THE COURT: All right.

xxx (Plaintiff's Exhibit 18 was received in evidence.)

THE COURT: What is the '69 figure?

MR. LASOFF: I didn't add it up, your Honor, but it appears to be between nine and ten thousand dollars.

MR. SHIELDS: What is the --

MR. LASOFF: I will give you the exact figures.

THE COURT: It is in evidence and the jury can look at it, but I'd just like to know for my own.

(Pause)

MR. LASOFF: $8,946.03, your Honor.

THE COURT: What about '70?

MR. LASOFF: $7,121.64.

THE COURT: Subject to the jury verifying that, they have been received in evidence. Any other rebuttal?

MR. LASOFF: No, your Honor.

THE COURT: How about the Third Party Plaintiff and the Defendant?

MR. SHIELDS: No, your Honor.

MR. TESTA: No, your Honor.

THE COURT: All sides have rested. At this point the taking of the evidence is concluded and we now go into the next phase of the case which you recall was that the lawyers now get an opportunity to talk to you for the second time. This is called the summation. We will take a recess before we do that and we will continue on from that point. Please don't discuss the case or make up your minds at this point.

(The jury left the courtroom.)

(Recess)

(In the courtroom in the absence of the jury.)

THE COURT: The first motion I will hear is in case number one, the motion of the defendant shipowner.

MR. SHIELDS: I move to dismiss the complaint upon the grounds that the plaintiff has not proved a prima facie case.

THE COURT: The motion is denied.

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MR. TESTA: If your Honor please, I would like to renew my motion to dismiss the third party complaint and for a directed verdict in favor of the stevedore for all the reasons that I enumerated in my motion to dismiss the third party complaint at the end of the third party plaintiff's case without stating them at length at this time.

THE COURT: That motion is denied.

MR. LASOFF: At this point, your Honor, it is my understanding that Mr Shields is withdrawing his claim of contributory negligence. With that in mind the plaintiff moves for a directed verdict on the issue of unseaworthiness, and if the motion is granted on that issue, we withdraw the claim of negligence. On the basis of the testimony adduced through the shipowner, and that is through the testimony of Captain Wheeler, the moment that lateral support that the ship claims was supporting the cargo was removed, this created an unstable and unsafe condition and the testimony is that that existed for 25 minutes. Notice of the shipowner of the condition or fault is not involved in this case and I say that in those circumstances as a matter of law the judge should direct a verdict since this is an admitted dangerous unsafe condition.

THE COURT: My feeling in the matter, that is essentially what this case has been about from the beginning, is really a contest between the ship and the stevedore as to

who is responsible here. Under the terms and conditions of the motions that have been made, that has just been made by Mr. Lasoff, if that is the condition -- is that the condition, Mr. Shields?

MR. SHIELDS: I did consent to withdraw the defense of contributory negligence since there does not appear to be any evidence that Mr. DeMauro himself personally was negligent. I think there is a void --

THE COURT: Under the circumstances I grant the motion and the case will proceed to the jury on the question of damages as between the ship and the plaintiff. We will proceed on the third party cause of action between the ship and the stevedore. Those are the two issues this jury will have. I am prepared to rule on the requests that are made. I will start with the request made by the third party plaintiff. There are two documents here, but one is a copy of the other. I notice there's supplement albeit third party defendant, but there is only one by the defendant third party plaintiff. Number one is granted in substance. Number two is not because of the motion I just granted, as is 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15. Sixteen is granted in substance. Seventeen is granted in substance. Eighteen is granted in substance. Nineteen is granted in substance. Twenty is granted in substance. Twenty-one is granted in substance. Twenty-two is denied in

the form requested. Twenty-three is granted in part in substance and in part denied starting with the word "and" in the fourth line. Twenty-four is granted in substance. Twenty-five is granted in substance. Twenty-six is granted in substance. Twenty-seven are the rules and regulations. I took judicial notice of that. Twenty-eight is granted in substance.

MR. TESTA: If your Honor please, may I have an exception to all of those requests to charge of the third party plaintiff which your Honor has granted, for the record?

THE COURT: Yes. Now taking the third party defendant's requests one and two insofar as they relate to damages is granted in substance. I consider number three, four moot. Number five is granted. Number six is granted. Number seven, eight, granted in substance. Number nine granted in substance. As is ten. Number eleven is denied in the form requested. As is number twelve. Number thirteen is granted in substance. Numbers fourteen, fifteen and sixteen and seventeen are moot. As is eighteen, nineteen, twenty, twenty-one. Twenty-two is moot. Twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven. Twenty-eight is granted in substance, twenty-nine is moot. Thirty is moot. Thirty-one is moot. Thirty-two is denied in the form requested. Thirty-three is granted in substance. Thirty-four is denied in the form requested

Thirty-five is denied in the form requested. Thirty-six is denied in the form requested. Thirty-seven is denied in the form requested. Thirty-eight, thirty-nine and forty are granted in substance.

MR. TESTA: May I have an exception, your Honor, to all the third party defendant's requests to charge which your Honor has refused to charge, for the record?

THE COURT: The exception is noted. I also rule on the additional requests of the third party defendant.

Number one is denied in the form requested, as is number two, three and four. Number five is granted in substance as is number six, seven, eight and nine.

MR. TESTA: May I have an exception to your Honor's refusal to those of the third party defendant's additional requests to charge?

THE COURT: The exception is noted. I indicate when I say granted in substance, what I mean by that is, you will have to pay attention to the charge and if you are not satisfied the way the Court covers that particular area in that request you will have to make it known to me before we finally give the case to the jury. How much time are you going to need?

MR. LASOFF: I won't take more than a half hour, your Honor. Probably less.

MR. SHIELDS: Probably less than that.

MR. TESTA: I will be more than that, your Honor, since I have to cover both situations here.

THE COURT: How much time?

MR. TESTA: I may need an hour. I will try to do it in less, if possible.

THE COURT: All right. Bring in the jury.

(The jury entered the courtroom.)

THE COURT: I explained to the jury that while you were in the jury room I heard certain motions which were directed to the law in this case. And you remember when I drew this diagram over here, that there were two causes of action. One is the longshoreman against the ship and the second one is the ship as against the stevedoring company on the contract which they had in existence between them. And you will recall I told you that in order for the plaintiff to win in the first cause of action he would have to show that the ship was unseaworthy or that there was negligence or that there was both. In analyzing this evidence I have determined as a matter of law that this longshoreman is entitled to recover as far as the ship is concerned on the doctrine of unseaworthiness, which requires no fault or lack of diligence on the part of the ship but merely requires that the ship at the point in time was not reasonably fit for the purpose for

which it was intended and I felt that crates falling on a fellow like this certainly was not reasonably to be intended by a longshoreman and, therefore, I have determined that as far as that cause of action is concerned he is entitled to recover. The question still remains as to how much he is entitled to recover, as far as that first suit is concerned. The negligence aspect of the case has been withdrawn so you don't have to go into that at all. As far as the ship and the longshoremen are concerned your sole duty will be to determine how much was he damaged in this particular case. I will give you the rules of law concerning that, and that will be your sole function as far as the first part of this case is concerned, case number one. Case number two as between the ship and the stevedore is in the very same condition as when I put that diagram on the board. That will have to be determined by you. That there was a contract is not disputed between the parties. The question is whether there was a breach either on the part of the ship or a breach on the part of the stevedoring company. And you will have to make a determination as to that. If you determine that the ship is entitled to recover because the contract was breached, then they will be indemnified by you by giving to the ship a judgment so that the recovery of the longshoreman will be against the stevedoring company. On the other hand, if you find that the stevedore is justified in his

defense, then, of course, the ship will have to pay the judgment. Now at this point all the sides will address you on the various arguments they desire to make in their particular area.

MR. TESTA: Your Honor, Mr. Lisoff, Mr. Shields, Mr. Foreman and ladies and gentlemen of the jury:

We have now arrived at the point in the lawsuit which we lawyers like to refer to as the moment of truth, because the lawsuit is, in fact, a search for the truth and you, members of the jury, are going to have to decide just where the truth lies and where the responsibility for this accident lies. There is no question that something happened to Mr. DeMauro. He had an accident. He was hurt. But the question that you are going to have to decide is, whose fault was it. Who is responsible for this accident and for the injuries sustained by Mr. DeMauro? That is what you have to decide.

You took an oath as jurors to render a fair and impartial verdict in this case and that's all I ask of you, that's all my client asks of you, to be fair and just and render a fair and impartial verdict in this case. To render justice, in other words. What is justice? What is right? What is fair? Under the facts and circumstances in this case? And that's all I want you to do. I want you to do the right thing. I want you to be able to sleep when you go home at

night after this case is over, knowing in your hearts that you did the right thing, you did what was fair and what is right and what is just. And that you rendered justice in this case. I don't know whether you ever noticed or not, but there is an inscription on the courthouse across the street that says the true administration of justice is the firmest pillar of good government, and it is. That is what you are here for, to render justice and the true administration of justice. And the key word is true, in that inscription. We have as Judge Cannella told you, two lawsuits here. He has made a determination as to the first claim involving Mr. DeMauro's action against the shipowner. He has explained that to you. But he has left to you members of the jury to decide the second claim by the shipowner against my client, the stevedore.

At the outset of this case I told you what the stevedore's position was in this case in great detail and I told you that the stevedore didn't belong in this case and I told you that after you heard the testimony I would come back and talk to you again and explain to you why my client doesn't belong in this case. What is this case all about? It is about cargo. Three cases of cargo that are reflected in photographs that are in evidence, and I'd like you to take the pictures into the jury room with you, and any other exhibits

you want to take with you, and look at these pictures. There are two -- well, there are several versions of what happened here. But basically there is no dispute that this cargo was put on this ship by some other stevedores, either in Oakland, California, or Honolulu or Subic Bay, or somewhere on the West Coast. This is undisputed. Mr. Shields conceded that these cases that fell on Mr DeMauro were put in the hold of this ship on top of the pipes, on top of these pipes, by stevedores on the West Coast somewhere. And then the vessel made a voyage. But before the vessel made the voyage and after these stevedores on the West Coast had put these cases on top of this pipe, they inspected it, the officers of the ship inspected the stowage, and they were satisfied or they never would have sailed with that ship. They were satisfied that that was proper stowage. The way these stevedores on the West Coast had placed these three cases on top of these pipes.

The chief mate testified and he said that they inspected it. His testimony was read to you and it is part of the record. I marked it off with clips, and there is no question that they did. The question that was put to Mr. Gonzalez on his deposition:

"Q When loading operations were completed in Oakland, was the area of the lower 'tween deck of number

four and number five hatch inspected?

"A Yes, sir."

So there is no question that after these cases were loaded on top of this pipe that Mr. Gonzalez, the chief officer of the ship, went down and inspected it. And he was satisfied that it was okay. And he was asked again, "Had the lower 'tween deck of number four and number five hatch been inspected by the ship's personnel after loading operations were commenced in the lower 'tween deck of those hatches.

"A In Oakland, yes."

So there is no question and there is no doubt that my client, International Terminal Operating Company did not put these cases on the ship. They were put on there by other stevedores in Oakland, California, and then the manner in which they were stowed was inspected by the chief mate of this ship, the Green Port, Mr. Santiago Gonzalez, approved and he was satisfied with that stowage. As I said before, if he wasn't satisfied they never would have sailed, because you heard Captain Wheeler's description of this voyage, this stormy voyage with the ship pitching and tossing and rocking and rolling. And if those cases hadn't been secured properly they would have been rattling around in the hold of that ship and you heard me ask Captain Wheeler, they may have made a hole right in the side of the ship, wouldn't they? He said yes

and where is the 'tween deck, it was right down by the water-line. If they had made a hole in the side of the ship, the water would have come in and this ship would have sunk. So they were concerned about this stowage. They were rightfully concerned about this stowage because we were responsible for the stowage. We were responsible for the safety of the ship, of course they didn't want it to sink and drown, but they are also responsible for the cargo that is in the ship. They are responsible for cargo from one place to another that belongs to somebody and they didn't want anything to happen to that cargo. They didn't want anything to happen to their crew either. So they checked it and they were satisfied that it was stowed properly. And then they made this voyage and you heard Captain Wheeler describe the odessey of the SS Greenport, the heavy waves and the terrible seas that they went through from Oakland, through the Panama Canal, up the East Coast, past Cape Hatteras, a couple of ports they stopped at, Charleston, Norfolk, and finally, Bayonne. And they get into Bayonne. Up to this point, it is their ship, it is their cargo. They are responsible for it and they are admittedly responsible. There is no question about it. They concede this. They get into port and say all right, now we are going to have the cargo unloaded. So they hire my client, I.T.O, to unload this cargo. And an accident happens. These cases fall

and they hit Mr. D'Mouro. And then everybody starts running. What are we going to do now, an accident happened. How can we pass the buck? How can we put the blame on somebody else? How can we lay it off on the stevedore, in the immortal words of Captain Wheeler. Lay it off on the stevedore, that is what he said. I remember when I asked him in the final analysis, who is responsible for the safety of the ship and the stowage of the cargo, the loading and the unloading, he said that was the responsibility of the ship. But they'd lay it off on the stevedore if they could. And he said that is what the third mate was there for, to lay it off on the stevedore. But the third mate didn't exactly say that, or the chief mate. He didn't say he was there for that purpose. He was the chief officer. The question is:

"As chief officer on the Green Port, what were your duties on March 31, '71?"

That is the date of this accident.

"A In charge of discharging the ship or loading, whichever cargo operation was being conducted at the time. At the same time the maintenance and routine work on the ship.

" Was it part of your job to supervise the work of the longshoremen to see that they discharged the vessel properly?

"A Yes.

"Q In connection with that job, did you have the third mate on duty to see that they did discharge the cargo properly?

"A Right.

"Q If you or the third mate had seen any activity in the cargo hatch which you considered improper or unsafe, would you have stopped the longshoremen from conducting those activities?

"A Yes, sir.

"Q At any time on the 31st day of March, '71, did either you or the third mate have any complaint with the way the stevedoring operations were being conducted?

"A No, sir."

So Mr. Santiago Gonzalez by his own testimony admittedly was in charge of the loading and unloading operations. And he was there to see that everything went off properly and he admitted it was his responsibility. And he didn't find any fault with the way things were happened. That is, not until something happened. And then he decided it was a good time to find there was somebody else's fault instead of the fault of him or any of the officers on the ship or the shipping company. This is when the project of laying it off on the stevedore began.

As I pointed out to you in the beginning of this case, there is a burden of proof. And I mentioned to you at the beginning of the case, Mr. Lasoff spoke to you first, Mr. Shields second and I spoke to you last, that was at the beginning. Now at the end of the case I speak to you first, Mr. Shields speaks second and Mr. Lasoff speaks last. And that is because the burden of proof is with the plaintiff, Mr. DeMauro, in his case against the shipowner, and it is with the shipowner, Central Gulf SS Corporation in its case against my client where they say that we breached the contract, that we didn't perform the stevedoring services in a workmanlike manner. It is their burden of proof. It isn't enough to say it, they have to prove it. And there was no testimony in this case. Who did they bring in to testify? Nobody. Captain Wheeler was the only witness that they brought in to testify. So I say to you at the very outset, they did not sustain the burden of proving that we breached our contract or that we, as they claim, did not perform the stevedoring services in a workmanlike manner. After I am through talking, Mr. Shields will speak and I won't get a chance to answer what he has to say. So I have to anticipate at this point, and I hope that I do anticipate everything that he has to say. If I don't, I am relying on you members of the jury to answer for me because you heard the testimony in this case. When he is all through

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and Mr. Lasoff is all through, I can't get up again and say no, it didn't happen that way or anything else, but I have to rely on you members of the jury to answer those questions for me, because he brought my client into this case and claims he is entitled to get back any money you award Mr. DeMauro. Of course, I say he is not entitled to get back from my client, I.T.O., any money that you members of the jury decide to award to Mr. DeMauro. And there are very good reasons for that, because as I said to you in the beginning it is a question of fault or responsibility. And I say that my client was not at fault and was not responsible for this accident. Sure an accident happened, but why did it happen? It happened because these cases were not properly stowed in the first place. If they were properly stowed in the first place, secured and chocked, the accident never would have happened. But once it does happen, then they want to lay it off on the stevedores. And they say well, you fellows went in there to unload this and if it wasn't properly stowed it is our fault but you should have done something about it. You took away the lateral support. What were we supposed to do? We are stevedores, we are hired for the express purpose of taking the cargo out of the hold of the ship. How can you take it out? It is in there. Visualize this room if you will, as being the hold of the ship. Maybe it is not as big as this, but it is packed

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in all directions. Stashed. You don't sail a ship with just two pieces of the cargo in it. They couldn't make any money that way. They fill up the hold from one side to the other. Forward, aft, athwartships. You have to start some place. You take something out in the middle and it isn't properly stowed in the first place, something is going to fall. So they said you shouldn't do that, you shouldn't take something from the middle. That is the only place you can start, because the square of the hatch is open. The last cargo is put in in the middle and the first cargo comes out in the middle. That is the only way a stevedoring operation can be run. So they say, we stowed the ship, we inspected it, we were satisfied with the stowage of the ship but you should have seen that there was something wrong here, you should have seen if we didn't stow it properly. Even though they say we did stow it properly, and Mr. Gonzalez inspected it and was satisfied with it, we should have some extra sensory perception and look down and say it is not stowed properly, so we are not going to work, we will just leave it there. Then they bring in Captain Wheeler who says if they take away something that is supporting something else, it is going to fall. It will only fall if it wasn't stowed properly in the first place. We have a right to assume that if the cargo was in the ship it was stowed properly and it is not going to fall on us if we

take something out. Because we have to take the things out. That is what we are there for. Then Captain Wheeler says well, if you are going to take something out, you should shore up the other stuff. Imagine, we are unloading the ship and we are going to put in timbers and boards, we are going to nail up all the stuff which we are taking out of the ship. If that makes any sense, I don't see it. You are not going to secure things, you are not going to put up boards and everything and nail everything to the side. Then you couldn't take it out in the first place. The whole objective in an unloading operation is to take the cargo out, not to nail it to the side so where is the responsibility for that case? I say it is the shipowner's responsibility. It is their ship, their cargo, they were responsible for its safe stowage in the first instance and if an accident happened, it is their fault and they can't pass the buck to us and they can't lay it off on the stevedore and say it is too bad, but you fellows shouldn't have unloaded it if we don't load it safely in the first place and if the vessel was unseaworthy, we were negligent, it is your fault. That is ridiculous. Now look at the testimony of the individual people.

Mr. DeMauro. He went aboard the ship and he was working there, and something did happen to him, no question about it. He was hurt. You heard the medical testimony.

But if you remember he said and all his buddies who came in and testified for him, they said the same thing, they didn't go anywhere near these cases. They didn't touch it. They weren't anywhere near it. The hilo was over there some place fifteen or twenty feet away. All of a sudden, down it came. All right. But they removed themselves from the whole area. They had nothing to do with this. That's all right. This is their version of something that happened here. However, I read to you the answers that Mr. DeMauro made to the questions put to him by the shipowner. He didn't say that these cases were just sitting there just perched precariously on top of these pipes. They were shored up. They had these boards there holding them up. There are the boards, right under the picture. The only problem is that when they did shore these things up and they did put these boards and nail them in to hold these cases up, they didn't do a good job of shoring. That is the responsibility of the shipowner. We didn't put these cases in there. Stevedores that they hired in Oakland put these cases in there and shored them up with these boards for the purpose of holding them in place during this voyage and they didn't hold. And while we were in the process of unloading, it crashed right through the boards. Now plaintiff's witnesses for some reason or other said that they were just sitting there, perched there on top of the pipes.

There is a question of credibility here. You have to decide who is telling the truth. Credibility is the key to any lawsuit and any issue in the lawsuit. How do you decide issues of credibility? You look at the people on the witness stand. How did they impress you? Were they truthful, forthright, candid? How did they come across to you? But more than that, does it make any sense? Does it make any sense what they are saying. These cases are just perched there precariously on top of these pipes and the ship goes through this sea voyage with all the pitching and tossing and rocking and rolling and nothing happens to them. They just stay there perched, one, two, three, four on top, an accident waiting to happen. Well, even Captain Wheeler said that couldn't be, that is impossible, they wouldn't stay there. The ship is pitching fore and aft and it is rolling from side to side and these things are going to be bouncing around all over the place. It is not possible. So I say it is a question of credibility. How can you believe that these cases were just perched there? That is for you to decide. You heard them testify. They all came in with the same story, which is diametrically opposite from the answers to the interrogatories that were prepared by Mr. Lasoff and signed by Mr. DeMauro, which I read to you where they said there was a cargo fence there and first he said it was the fence that hit him and then

they added in the cargo behind the fence. This was like an after thought. The cargo behind the fence, these three things that came down and hit them, too.

All right. It is a question of credibility. You saw Mr. Delmuro, you evaluate his testimony. You saw the other witnesses, too. He was injured, no question about it. He was treated. You heard the doctors describe the nature of the injury. There was a fracture of the femur. Dr. Seaman said that he had an excellent result. Showed you the X-rays there. Beautiful result. They put a pin in there. The whole purpose of putting the pin in there is to hold the bones in place and they held perfectly. And he is able to walk and he is walking and he has been walking around this courtroom all week. But he hasn't gone back to work, even though Dr. La Peluso said he could go back to work in January of '72 and again in April of '72. Ask yourselves why he hasn't gone back to work. I will tell you why. He has a lawsuit. And as soon as this lawsuit is over he will go back to work. Doctors came in and said he can't work as a holdman or deckman or dockman. But there are lots of jobs that he can do, which he hasn't seen fit to do. Just bear this in mind. Again I am talking about what is right and what is fair and what is just. There is no question that he had an accident, and he is entitled to be compensated. But he is entitled to fair, reasonable and

just compensation. He is not entitled to some outrageous sum of money because he says he can't go back to work or because he doesn't choose to go back to work or doesn't feel like it or because he is too fat to go back to work. He is the original five by five fat man who weighs 255 pounds and the doctors come in here and say he can't squat or bend. You couldn't squat or bend either if your stomach gets in the way if you want to squat and bend with that kind of weight. But bear in mind on the question of damages, I say to you he is entitled to damages, but fair and reasonable compensation. Again I want to impress upon you the necessity for being fair and just. Not only in connection with the liability as respects the case as to whose fault and responsibility it is, but also in connection with the damages. Give him what he is entitled to, what he is fairly and reasonably and justly entitled to, and nothing more. You saw the doctors. You heard the testimony with respect to the jobs that can and cannot be done by Mr. DeMauro. Mr. DeMauro, incidentally, is not presently receiving any treatment. Hasn't seen a doctor in a long time except, of course, for Dr. Graubard, who saw him just recently to come in here and tell you that he had a 40 or 45 percent disability of the leg. That is the only reason Dr. Graubard came.

Mr. DeMauro was down in this hatch and he was working

with the members of his gang and he was supposed to be down there. That was his job. That is what he was doing. And he had one very significant thing here. He said that this palletized cargo, and that is the cargo that the hilo operator, Mr. Vosk, was removing with the hilo by taking the prongs of this hilo and putting them in the bottom of the pallet, he said that palletized cargo was not leaning and was not supporting the cases. Your recollection, of course, is better than mine and you don't have to believe it because I say so, but I don't rely on my recollection. I write these things down, and that is what I heard Mr. DeMauro say, that the palletized cargo that the hilo operator was removing was not supporting those cases. And I want you to bear that in mind in connection with all this testimony by Captain Wheeler that if we removed all those palletized cases that everything else would come tumbling down. If Mr. DeMauro who was right there in the hatch at the time says that these palletized -- this palletized carto was not supporting these cases, then if we removed the palletized cargo we did not remove any lateral support because there wasn't any lateral support there in the first place. Just think of that, because you are going to hear a lot of talk about lateral support and how we went down there and removed lateral support, and like a house of cards or dominoes, we took something away and every-

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thing came tumbling down. But we didn't. Because Mr. DeMauro said that this palletized cargo was not supporting those cases. So when we removed it we didn't remove any lateral support. The thing that was supporting these cases was a cargo fence and the shoring. That is what was supporting these cases, and Mr. Finto told you, or I.T.O.'s safety engineer told you that he went on the ship the day before and he looked at it and it looked all right to him. Sure it did, because contrary to what all these witnesses said, it wasn't just perched there precariously waiting to fall over when somebody started the motor on the hilo or somebody down there breathed too heavy or coughed or sneezed. When he looked at it it was supported by these big planks, and he had every right to assume that that shoring was put in there properly, strongly and securely and would continue to support these cases during the course of the unloading operation. Because we, and I say we, I.T.O., we don't have the obligation to go down there and check every little nook and cranny of the ship and shake everything to see if it is all right. All we have to do is look at it, a visual, cursory inspection, and if it looks safe and proper for the men to go down, we are justified in going to work there, because we have a right to rely on the fact that that ship is stowed properly. They don't just warrant to the individual longshoreman that the ship is seaworthy.

We get that same warranty. The entire stevedoring, that this is a seaworthy ship and that this stable, secured cargo. We are entitled to rely on that representation. If we go down there to unload this cargo, that is safely secure all around, and when it was put in there it was put in there in such a manner that it could be taken out again without the whole thing falling down. We have a right to rely on that representation. But more than that, Mr. Pinto told you he looked at it and it looked safe and secure to him. And that's all we had to do. That was the whole extent of our obligation as far as an inspection is concerned. The other men in this case, Mr. Pratt testified, he said there were two boards there in place to keep the cases from falling and he made certain marks on these photographs and again I say to you, take the photographs in so you can see the marks made by Mr. Pratt. Also the marks made by Mr. Pinto where he put an S on these boards which he said represent shoring, and which you can plainly see are right underneath these cases that crashed through that shoring. Mr. Pratt for some strange reason said there were just two boards there with a couple of nails holding them in place, as if two boards with a couple of nails would hold these two cases. There are a couple of comments about how much they weighed, but the only direct testimony was by Captain Dealer who said one of the boxes had a marking

on it that said it weighed 1230 pounds. Would two nails in a board hold that kind of weight? Mr. LoMauro said the cargo he was working with in the hatch didn't have a cargo fence. We are talking about a cargo fence which divides the number four and five hatch. There is just a separation. In addition to what we are talking about, a cargo fence, which is shoring, which was holding up these three cases. So we have two different fences we are talking about. And Mr. Pratt said that the cargo in the number five hatch that he was working with was not up against the fence, that they didn't do anything. They were very careful that they didn't touch anything or do anything to cause anything to fall down. Mr. Gock testified and his testimony was pretty much the same as the others. Mr. Vosk was the hilo operator. He said that he was fifteen or twenty feet away when this happened. Although Captain Wheeler would have you believe that just operating the hilo there would cause these things to fall down. But he wasn't anywhere near them, he didn't run into them with the hilo, he didn't knock them over with a hilo. Sure he was operating the hilo, that is what he was there for, to move back and forth and take the palletized cargo out. Mr. Konecky testified. He told you that the stevedores were in there the day before this accident. He told you they took some cargo out the day before. We had to. If you have a hilo

in the hatch, you have to have a place to put the hilo in the middle of the hatch. There is no question that the hilo was there. This is all part of the job. These are the plaintiff's witnesses who told you that there was no shoring, nothing holding these cases up, they are just sitting there perched like the Sword of Damocles waiting to fall on Mr. DeMauro. And then Captain Wheeler came in, and his testimony was calculated to convince you that it is not really the shipowner's fault after all. So what if they didn't stow the ship properly and even if it is there responsibility, in the long run they are going to lay it off on the stevedore, and that is what he was there for and that is the sole and only reason he was there to testify because he doesn't know what happened, he wasn't there any more than we were. But he gave you this whole story about these terrible weather conditions and the rolling and pitching, et cetera. Because he wasn't there and doesn't know, and he is an expert, you heard certain hypothetical questions given to him. He was asked to assume if these cases were just perched on top of this wire -- pipe, I'm sorry. Just look at it. Look at that foundation they are on. Look at how uneven it is, how round these pipes are and how they slope down. He was asked to assume if these cases were on top of these pipes, could they have stayed in that position throughout the entire voyage. He said the cases would never have stayed

in place without shoring or securing. He told you what happened. Everything goes forward. When a ship hits a wave or a big wave breaks over the bow of the ship, everything goes forward including the salt and pepper and knives and forks on the table. So these cases, no way they could have stayed in place without shoring and securing. And there was shoring and securing. The only problem was, it wasn't strong enough. They didn't do a good enough job on the shoring or securing. So Captain Wheeler said this could not be, it wasn't possible. He said it would have been necessary to chock and brace the cargo to keep it from shifting fore and aft, and that these shores would run from the floor to the ceiling. And you look at them. They are big enough. They do, in fact, run from the floor to the ceiling. But, unfortunately, as I said before, they weren't put in properly, they weren't strong enough. And when these cases did fall, they went right through that shoring. At the end of Captain Wheeler's testimony, I asked him: In the final analysis, Captain, whose responsibility is the stowage of the cargo. And this I wrote down because this answer was a classic, and he said stowage of cargo is the responsibility of the ship unless they can lay it off on the stevedore. That is what the mate is there for. And that is what Captain Wheeler was here for. That was his whole function here, to try and put the blame on the stevedore.

Why should the ship accept responsibility for something that is clearly their responsibility, when it is their ship and their cargo, and the cases fell because they didn't stow it properly, why should she accept the responsibility when they can point the finger to somebody else and say it is their fault. That is very nice. But I say to you, members of the jury, again, all I ask is justice. A fair and impartial verdict. Is this fair? Is this right? Is this just, for a shipowner who concededly supervised the stowage of that cargo and inspected it after it was stowed, and who shored it up but who didn't do a good job of shoring it up, is this fair that he tend when something happens to say yes, well, it is our ship, our cargo, we didn't do a good job, but it really is their fault, they did something wrong here. What did we do wrong? We took the cargo out. So it is our fault because they didn't do their job right They would like to shift the responsibility, place the blame somewhere else, anywhere but on us. I say to you again, this is not justice. It is not fair, it is not right, and I am relying upon you members of the jury to render justice in this case. I say to you that it is their fault, it is their responsibility. It is their ship, their cargo, and the only reason it fell is because they didn't see that it was stowed properly. They didn't see that it was properly shored and it is their responsi-

bility, and whatever sum of money you decide to give to Mr. DeMauro, they are not entitled to get that back from my client. That would be a miscarriage of justice and I don't expect that to happen in this case. There was an accident report made by Mr. Pinto. He was there right after the accident happened. He told you, that is the way it looked. Right on the spot shortly after the accident happened. Here is the shoring in the picture, right under the cases. And he made an accident report which says: "While discharging cargo in the wing the cargo gave way and broke through the shoring and fell on the man's leg due to a latent defect of stowage."

I know that Mr. Shields is going to make a big thing out of the word "latent." Firstof all it is not spelled right on this record. It is spelled L-A-D-E-N-T. Mr Pinto is not a lawyer, he is not a college professor at Harvard. He didn't know how to spell latent. But he knew what it meant. And just to make sure, the judge asked him: what does latent mean. And he said it means something you can't see. Our obligation here was just to make an inspection, a cursory inspection for patent defects. Patent, I don't have to tell you ladies and gentlemen of the jury what that means. Mr. Pinto knew the difference between latent and patent. He knew that latent means something that could not be seen. And

he went on the ship and saw these things shored up, but he didn't see and couldn't see and he wasn't required to see this shoring was not strong enough to hold it. He had a right to rely upon the fact that they did the shoring and should have been strong enough to hold it. He didn't have to go over there and kick these boards and hit them or take a hammer and knock them down. So you are going to hear a lot from Mr. Shields about this word "latent." I ask you to keep in mind that Mr. Pinto is an important man who was a longshoreman and stevedore and don't hold against him the fact that he didn't know how to spell latent. There are some words that I don't know how to spell and I wouldn't want to have that held against me either.

There is in evidence a record of Mr. DeMauro's earnings, and I read it to you. It shows that he made about $4,000 the year before the accident happened. Mr. Lasoff has some records to show that he made more than that. But these records are joint returns as I understand it of Mr. DeMauro and his wife --

MR. LASOFF: If your Honor please, the only records admitted into evidence were the records of Mr. DeMauro's earnings. These are not joint returns. They are not returns at all. They were W2 forms.

THE COURT: I think that is so.

MR. TESTA: I was only going to say we are only concerned with Mr. DeMauro's earnings as reflected by his income tax returns. You will see the W2 returns and I'm sure you can distinguish which are Mr. DeMauro's earnings.

MR. LASOFF: We specifically excluded Mr. DeMauro's.

THE COURT: We separated them, Mr. Testa. The only ones before the jury are Mr. DeMauro's.

MR. TESTA: There was medical testimony in this case. I have covered the liability aspect. There was medical testimony. You heard first from Dr. Seaman. Dr. Seaman is a doctor who was brought in here to describe to you the operation. And he did that in great detail. He is a specialist in orthopedic surgery. And he came in here to tell you that this man had a broken femur, which is the big bone in the leg running from the hip down to the knee. Well, there is no question about that. There were X-rays here. There is no question he had a fracture of the femur. When the X-rays were put in the shadow box the site of the fracture showed excess callus formation. Callus is a fluid that the body sends to mend the broken bone. The excess callus means there is a lot of it there and it was mended. Strongly healed, excellent job. He said excess callus doesn't bother Mr. DeMauro. Doesn't bother him, the excess callus formation which makes a strong union of the two bones. This is his own

doctor. Then there is a fragment in the hip, in the X-ray, up in the top corner there, a little fragment there. Dr Seaman said a fragment of the hip is not a cause of Mr. DeMauro's disability. Not a cause of the disability. Then he talks about bone structure. Not disability. He talked about bone marrow, that they took out to put the pin in. You are going to hear a lot about that pin from Mr. Lacoff. But that was of no significance. Then he is asked if he knew that Mr. DiMauro had a fracture of the fibula. And he said it was not visible in his X-rays and he was not aware of it. He did have a transverse fracture of the femur. These bones were not broken up into little fragments. This is one bone, one clean break like that. That is what a transverse fracture is. They took the bone and they put it together, put the pin in it and it heals perfectly. There is no question about it. Dr. Seaman said he did an excellent job. To what are we talking about? There is no question that he had a broken bone in the leg, but it is healed, and he is better. And he is walking around. He is not a cripple and he is not disabled. Dr. Seaman said it is conceivable that he could do other work a a longshoreman. I asked him: could he work on a dock, could he hook up the cargo. Sure he could. Of course he would qualify it. Everytime I asked him a question, he said yes, provided he doesn't have to walk or bend or squat --

well, there are certain things you have to do. I mean, you have to walk around and every once in awhile you have to make a movement of some kind. But he said if all he had to do was stand there and hook up cargo that is being taken from the dock to the ship, he could do that as long as he could sit down once in awhile.

All right. He said he could walk up and down stairs. Even his own doctor did not come in here and tell you that this man can't do any work at all and is never going to be able to work for the rest of his life or anything like that. You didn't hear testimony like that. In fact, Dr. La Peluso, the doctor who operated on him and who put this pin in his leg, told him he could go back to work in January of 1972. The accident happened March 31, 1971, so nine months later Dr. La Peluso told him he could go back to work. He didn't go back to work. The operating doctor and the treating doctor continued to treat him until May of '72 and then told him he could go back to work again. And again he didn't go back to work. Not only didn't go back to work but he began looking around for other doctors, and he saw quite a few other doctors. They didn't all testify here. But he picked out two to come and testify, Dr. Seaman and Dr. Graubard. Dr. Seaman said he couldn't work in construction, but there were many jobs he could do in manual labor. That he could work as a

dockman. Strangely enough Dr. Seaman talked abut atrophy of the quadriceps muscle. That is the big muscle in the thigh that controls movements of the leg. And he said well, he's got a difference here. A half inch, an inch or whatever it is, in measurements from one leg to the other. And this is atrophy of the quadriceps muscle and for this reason you can't walk or bend or squat or any of these things. Exercise, though, would correct that condition and would restore the quadriceps muscle to normal but he for some strange reason didn't recommend exercises or treatment. Why? Because he wasn't a treating doctor. He is just a doctor who examined him for the express purpose of coming to court and telling you about this fracture and the operation, that's all. He wasn't supposed to treat him. If you are not supposed to treat him you don't tell him that if you exercise a bit you will be all right. The leg lengths were all right. Dr. Seaman said he didn't even measure the atrophy, but measurements are severely unreliable. However he was loud in his praise of Dr. LaPeluso who did a beautiful job, as he said. And he finally concluded his testimony by saying that exercise would restore the quadriceps muscle to normal. It would, if he would only do it. But apparently he hasn't seen fit to do it.

And Dr. Graubard come in here. Dr. Graubard

is the well-known doctor around courts, and he told you he has examined about 30,000 people since he was admitted to practice back in 1932. He examines people for the express purpose of finding percentage disability. And he does find percentage disability in every case. I asked him, 30,000 cases, Doctor, you examined, you find percentage disability in every one of them?

MR. LASOFF: Your Honor, that is an exact misquote. He said most of them.

MR. TESTA: I beg your pardon.

THE COURT: The jury's recollection will control.

MR. TESTA: I will even go along with most of them. He finds percentage disability in most of them. Maybe 27 or 28 thousand out of 30. Isn't it strange that he is the doctor chosen to come in here to tell you that Mr.DeMauro has a 45 percent disability of the leg. Dr. La Pelusa didn't come in here and say that. None of the other doctors did. This is the doctor who is chosen to come in and tell you about this 45 percent disability of the leg. And to tell you that he can't work in the hold, the dock, the deck, or any place. Of course, he took no X-rays. The amazing thing, though, about Dr. Graubard's testimony is that he didn't even agree with Dr. Seaman. He said that this calcification of the head of the femur, which is the top of the bone, he said that that

is the source of the pain and weakness and limitation of motion that Mr. DeMauro says he has. But Dr. Seaman said no, it isn't. He said that is not disabling. That doesn't bother him at all. Amazing. The two doctors who came in to testify for the plaintiff didn't even agree on what the cause of his disability is. And he didn't mention atrophy, Dr. Graubard. He didn't even find atrophy at all. There were two other doctors who testified in this case, Dr. Tagliagambe and Dr. Andriola.

Dr. Tagliagambe did not find all these terrible things wrong with Mr. DeMauro. He did make some findings, but not to the extent that these other doctors did. He found no atrophy, the measurements of the thigh and the right and left leg were the same, the measurements in the knees were the same, the calf was the same. There was no shortening of the leg, no deformity, no swelling, no discoloration. The only thing he found was a mild restriction of internal rotation and external rotation. And he said the defect of the leg was not in excess of ten percent of the right leg. So he didn't say that there is nothig wrong with him at all. He said yes, he's got a defect, but not 45 percent defect. He said not in excess of ten percent. And that he was able to perform regular work as a longshoreman. Dr. Tagliagambe is a doctor who treats many longshoremen and he knows what the type of work is that longshoremen perform and he said that Mr. DeMauro

can perform thejob of a longshoreman which includes dockman, deckman, holdman and what have you. He knows a lot better than Dr. Seaman or Dr. Graubard what is involved in being a longshoreman and what they have to do, and he said he can work as a longshoreman. He saw him on November 20, 1973. Dr. Andriola saw him and he said that the present disability is not causally related to this accident. Dr. Andriola found no atrophy, no limitation of motion or flexion or extension. No instability of the right knee, no limitation of motion any place. And he said that on May 1, 1972, when he saw Mr. DeMauro that he could go back to work as a longshoreman. And said that his present disability is not causally related to the accident of March 31, 1971, but due to patient's extreme obesity which is producing cardiopulmonary symptoms. I know that Mr. Lasoff is going to make a big thing about this. But Dr. Andriola said it and he was asked by Mr. Lasoff, look at the hospital record, did they give him any drugs for cardiopulmonary condition, he said yes, they gave him Aldactazide in the hospital. And it is commonly given to people who have cardiopulmonary disease. So when you hear Mr. Lasoff tell you that this is not possible, couldn't be due to extreme obesity which produces cardiopulmonary symptoms, just remember first of all what Mr. DeMauro looks like now when we are talking about extreme obesity and the fact that they did give him a

drug for cardiopulmonary disease in the hospital, in Bayonne hospital. There is expert testimony on both sides of the case. You heard Mr. Wheeler, Mr. Keeler, Mr. Pinto. You heard all the witnesses in the case. But what does the whole thing boil down to? The whole thing boils down to a very simple question for you. Who is responsible for this accident, who should pay for the accident? Who was at fault? Who was negligent, who was responsible? And I say to you again, that the fault and the responsiblity for this accident lies solely and only with the shipowner. It was their ship, their cargo, they stowed it, they didn't stow it properly, it wasn't shored or secured properly, and they cannot get indemnity for any client, if there is any fairness or justice in this world, I say to you that they cannot get any money which you members of the jury award to Mr. DeMauro from my client because it was not my client's fault. We did not breach any warranty of workmanlike performance. We removed the cargo from this hold in a workmanlike manner. And the fact that these cases fell had nothing to do with the way we removed the cargo from the hold of the ship. Bear in mind that Mr. DeMauro himself said that the palletized cargo that we were removing was not supporting these cases, so we didn't remove any lateral support. You will hear about regulations for longshoring that caution should be taken when unloading so that something else

doesn't fall down. We did it. The reason these things fell down is pure and simple. The shoring put there by stevedores on the West Coast hired by the shipowner wasn't good enough. Wasn't strong enough, and broke and gave away and fell and that is the only reason this accident happened and it is solely and only the shipowner's fault and it is not our fault in any manner, shape or form, and I am going to ask you after you hear what Mr. Shields and Mr. Lasoff have to say, I am going to ask you again, as I think I covered everything here. But I am going to ask you to cover everything they say, because I can't. In the final analysis, it is their responsibility, their fault, and whatever money you award to the plaintiff they cannot get back from my client, so I am going to ask you to bring in a verdict in favor of International Terminal Operating, Co., Inc., and let them out of this case. Thank you.

THE COURT: We will suspend at this time until two o'clock. At that time Mr. Shields will come back and address you and, of course, Mr. Lasoff. In the meantime please don't discuss the case or form or express any opinion in this matter until it is submitted to you for your decision.

(The jury left the courtroom.)

(12:45 P.M.)

AFTERNOON SESSION

THE COURT: Your exceptions to my rulings are noted, Mr. Shields.

(The jury entered the courtroom.)

MR. SHIELDS: Your Honor, fellow counsel, Mr. Foreman and ladies and gentlemen of the jury:

It is my turn to address you. I hope you are not disappointed and I hope Mr. Testa won't be disappointed, but you are not going to hear a lot from me. You are not going to hear a lot about latent or much of anything else except what I think happened, and I am going to try to make my comments as brief as possible. I think first I will make some reference to the medical testimony that has been put in here, and if it is repetitious, please bear with me, but I feel I must make these comments.

There were four doctors who came to court to testify, and all four seemed to be in agreement that this man suffered a fracture of the femur, which is a very serious injury. I make no intention of belittling the injury. It was painful, and it is something I don't want and nobody here in this jury wants, and he has to be compensated for it. The judge has so decreed. The amount to be compensated, however, is something which is your sole province. The compensation should be for the injury only, for the injury and other elements which

the Court will explain. But it should be a fair amount. Neither too high nor too low.

Who are these four doctors? Dr. Seaman; Dr. Seaman was called in for the first time about four months ago, in November. His main comment was, this man had a marvelous recovery from this fracture of the femur. He was completely unaware of the other fracture, which there was no indication of on his X-rays. The, he said, and I'm not sure of why, the basis for it, but the man has instability of the knee and, therefore, he can't work. The other doctor that was called by the plaintiff, Dr. Graubard, I don't think he is worthy of belief at all. 30,000 cases, most of them have permanent disability -- this is his job. But what really strained my credulity was when he said that a good part of this man's disability, a good part of that gentleman's disability was caused by the cast. And he never had a cast. So that is a good doctor. That is somebody worth listening to. I called two doctors. I brought them in by subpoena. I had never met either one of them before. As far as I am concerned they have no axe to grind. They both said they were called in as consultant in an attempt to determine just what the plaintiff's condition was. He had already been told by the operating surgeon, and he is the man who really knew this man's condition, that this man was, according to Dr. LaPelusa,

able to work, not in January, '72, as Mr. Testa said, but I believe April. You will have to rely on your own recollection. But it was to my recollection slightly more than a year later which both Dr. Seaman and Dr. -- the other one, the 30,000 case doctor -- both of them were of the same opinion, that a year, about a year would be a reasonable time for recovery from this type of accident. In fact, it was Seaman's opinion that this man got off crutches earlier than the normal patient would have and he got off his cane in a shorter period of time. The two doctors I called, who as I say had no axe to grind and were unknown to me, although I had seen their reports earlier this week, came in and they both agreed the man would be able to go back to work. The one doctor, Andriola, didn't really say that. He said the man did have a disability but it was completely unrelated to the fracture of the femur. He gave other causes. One of which was the excessive or extreme obesity of the man. So please bear those things in mind when you are deliberating in the jury room and arriving at a figure which is just and fair for the plaintiff.

Who is going to pay? This is quite important. I am the shipowner and as the Court will tell you, there is a legal obligation on my part to provide a seaworthy ship. A seaworthy ship is almost an insurer of the safety of anybody working aboard it. The judge characterized it as non-fault.

It is little more than an accident happens and the ship is cast in liability to the injured person. Even though legally the shipowner is initially at fault there is a process which we call third party summons and complaint. We can then bring in another party who we believe was the cause of the condition which made the vessel unseaworthy which caused the injury. And it is something that existed without any knowledge of the shipowner, without any control of the shipowner, but it was created by somebody else and that somebody else must pay.

There are a couple of things here I'd like to point out. We have these photographs which have been marked in evidence. They were taken some three or four hours after the accident. There isn't any question but that the accident occurred in hatch number four. Everybody was in agreement on that point. The pictures were taken many hours later and they show the four cases in hatch number five. This was the testimony of Captain Wheeler, an experienced seaman. He was able to examine these photographs and say these are now in hatch number five. So I say to you, these photographs, except for showing the size of the cases and their weight and admittedly this one here, right here it says 1,230 pounds. The other one which weighs the same and there are two smaller ones. But they were moved before these pictures were taken.

After the accident, before they were taken. I don't think they are worth anything. And also take a good look at them. They talked about these things crawling through some wood. Look at this wood and see if you find a single splintered end where something broke. No. You will find nice, smooth saw-cut ends. So that these were probably placed on top of some dunnage or from the temporary bulkhead which had been broken down after the accident by the stevedores. The accident itself, when I opened briefly to you gentlemen and ladies on Monday, I said very little and I asked you to listen carefully and at the end use your logic. There is only one conclusion I believe can be drawn using logic and reason. At 7:30 A.M. on March 30th, that is the day before the accident, a Mr. Pinto, the safety man, that is what they call him, for I.T.O., went down into hatch number four lower 'tween deck. How he got there is something of a mystery because he said he went down through the open hatch, but nevertheless when the gang came on that afternoon they had to open the hatch and take everything out. But he just walked right through these hatches. But at 7:30 in the morning he went down and he looked at this particular stow of cargo. And he said that is stowed beautifully. He had the four by four or whatever type of board wedged up to the ceiling and he had other pieces of wood driven in, it is absolutely secure, safe

place to work for his men. For his men, the longshoremen. So the longshoremen went to work there that afternoon. There is some mystery of what went on that afternoon. There is no question Patsy and his gang went down into the hold that afternoon. Patsy doesn't remember exactly what they did and I don't find fault with that either because the next day he suffered this injury and I'd be a little hard pressed to remember some of these details, too. But he didn't remember, nobody else seemed to remember exactly what was done. But we do know that this was done: at least the cars that were stored in the square of the hatch were removed and the hilo was taken down. I have a suspicion that a good deal more cargo was taken out on that afternoon of the 30th, and I think this Defendant's Exhibit B-Third Party Plaintiff's 1 will demonstrate it to you. It shows a long, long list of the items that were stored in the number four lower 'tween deck. And it seems to me that it is a lot more cargo than was described as being in the hold the next morning, the 31st, the day of the accident. But on the 30th, and this is I.T.O.'s own man, said the cargo was properly stowed and everything was in good order and condition. Well, it had to be. It is logical that it had to be, because the vessel had gone through a very arduous journey, as described by the captain, and if any of you know anything about seamanship, you are absolutely

free to look at this, and you will verify it in your own minds. But it was a very tough voyage. This cargo, this ship, rather, was knocked around, it was slapping, they had to slow down, it was banging into the waves, it was rolling. When it got into Bayonne, and that cargo was in beautiful condition. Their own safety man said so. Something was done in number four lower 'tween on the afternoon of the 30th. A I say, I don't know precisely what. But the next morning at 8:10 or 8:20, after the gang had taken a bus up to the ship, gotten onto the ship, taken covers off, got down below, I think it was about 8:20, they all, the four of them that were here, they all saw that cargo and there was nothing on it. Nothing except other cargo. The supports that had been built to keep it in place were gone. Nobody could have removed it except I.T.O. and its people. There is no other way that it could have happened. But the cargo was still secure. As is normal practice, other cargo was stowed against it. So you have it all the way across the front of the ship. The names escape me. One of them was Mr. Goch. Goch had a distinct recollection of this cargo being against the cases that fell. The Hilo driver I don't think had any specific recollection, but you try to remember the testimony. Anyway, it was there and they started to break down the cargo. Break down is a term that stevedores use for removal of cargo. And

In breaking down they started on the offshore side right next to the cargo that eventually fell, these four cases. They removed the supporting cases, palletized cargo. They took it out and sent it upstairs. They removed eight or ten of those drafts. Mr. Keeler, who is the expert who was called by I.T.C. said at that point the longshoremen should have removed those four cases, either taken them down, taken three of them down and palletized them here and here to move them later, or perhaps they could have been chocked. I don't know how you do that, but he said perhaps they could have been chocked. But very definitely get them out of there, because when the longshoremen removed those palletized cases they created a dangerous condition, and that was the dangerous condition which ultimately caused an injury to Mr. DeMauro. Not only was it obvious to Mr. Keeler that something should be done when they were breaking down that supporting cargo, but the United States Government, the United States Department of Labor has seen fit to make rules which are law, they are not just rules that can be abided by or not, they are law which must be complied with. In the very definitions in the act say, when we use the word "shall" in these rules, we mean that what we say is mandatory. Then they go on to say that -- we are talking about stowed cargo, tiering and breaking down. Tiering and breaking down. "In breaking down precautions shall

be taken when necessary to prevent the remaining cargo from falling."

They didn't, and the cargo fell. They are in absolute violation of the rules that were made for their very own safety. Now, they are trying to say the ship's officers should have been down there. There is one ship officer on duty, as testified by Mr. Keeler. He's got seven hatches to cover, three or four layers in each one. Is he a miracle man who can float around from here to here? Of course not. That is not his duty, that is not his job. We, the shipowner, hire experts. We hire stevedores who are trained in the removal of cargo, and we pay them a lot of money to do it because of their expertise. And we rely on it. And they do it wrong sometimes and they did it wrong this time. And it is not, therefore, I say, the responsibility of the ship. Another thing about the disappearance of the shoring that had been on the ship the morning before, when Mr. Finto was there. I find this kind of interesting, curious. You will have to draw your own conclusions from it. When the cases fell, Mr. DeMauro was carrying a piece of four by four. I asked Mr. Keller, is four by four ever used for dunnage or fending. He said no. It is used for shoring. Who broke down the shoring? I don't know. But Mr. DeMauro had a piece of it in his arm or his hands when he was injured. Mr. Testa made a

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great deal about a game of semantics that he tried to play where he said that my mate testified that it was his duty to supervise the vessel and the discharge of cargo. Well, it most certainly was his duty but it is his ship. If the captain isn't there he is in command, and he doesn't want anything on that ship destroyed. So for that reason he has a mate who wanders all over the ship just to make sure that nothing destructive is going on. This is the supervision we are talking about. But we have no supervision of the stevedores. If we go down and interfere with the work of the stevedores they will be off the ship like that. Because they are different unions. We have nothing to do with the stevedores and can't tell them what to do once the mate or the captain and the head of the stevedores discuss it in the morning, and say all right, we are going to unload this hatch, that hatch, that hatch. But we do not supervise the discharging of cargo. It is an absolute impossibility and that is why we hire the experts to do it.

When you hear from the judge, the judge will charge you on the law and he will use terms like seaworthiness, reasonable fitness --

MR. TEJTA: If your Honor please, I don't think it appropriate for counsel to say what your Honor is going to charge them as to the law.

THE COURT: He is clairvoyant and it is not usually done. But there isn't a lawyer yet that I have seen sum up a case that hasn't told what the law is. But leave the judge out.

MR. SHIELDS: I hadn't told the jury what you were going to say. I just said you were going to use some terms, I hope.

Listen to what the Court tells you when he explains the law to you, and I think that there is only one logical conclusion that can be drawn from the facts. There is really very little dispute to the facts. There is only one conclusion that had been drawn and that is that the vessel came in in a seaworthy condition with cargo well stowed, secured, having been through this long, hard voyage. The next day the cargo was no longer secured, with no one from the ship having gone down there, only the stevedores. And then sometime about nine o'clock in the morning, the cargo is standing there unsecured having weathered the transit from the West Coast down through the Panama Canal up to Charleston, all ports up to there, it weathered all that. But now they say it is unsafe because for some reason or other, without any interference from anybody, it must have been an act of God, this stuff fell over. It fell over because of one condition, this was done solely by the stevedores, who made it absolutely necessary that it should fall over.

They were negligent, they violated their duties to the shipowner and they should reimburse my client for anything that I have to pay for the injured plaintiff.

Thank you very much.

MR. LAGOFF: May it please the Court, Mr. Shields, Mr. Tormey, Mr. Testa, Mr. Shields, ladies and gentlemen of the jury:

You ladies and gentlemen are here to do a valuable service to the community. Part of the fun of that service has been taken away from you because you have a directed verdict from the judge that Mr. DeMauro must recover so you don't have the privilege to find he is right. He has been found as a matter of law to be right. And there is no claim of contributory negligence. He has done nothing to contribute to the accident. So all I am going to talk to you about is money, his damages. That is my only function here. I don't care if you find the ship or the stevedore responsible. Mr. DeMauro at first retained me to do that, but we are past that stage. I am here expressly for the sole purpose of convincing you as to the severity of Mr. DeMauro's injury and the money he should get for it.

We have a man, I think Mr. Testa referred to him as Mr. Five by Five. Well, Mr. Five by Five, when they used his 230 pounds to move cargo, they didn't object to it. He

doesn't weigh any more now than he did at the time of the accident. He was always a man, a stocky man, a bulky man, or if you want to call him, a fat man. That is his privilege. I tried all my life to gain weight and I can't gain an ounce. Some people have different metabolisms. Some people are fat, some are skinny. That has nothing to do with this case. He is working in a hatch, he is getting a day's wages for a day's pay. He is a manual, physical laborer. They are not hiring his brains, they are hiring his body. And they put him down there and they tell him to discharge this cargo. And when this accident happened he was in the act of taking some wood away so the hilo can go in and pick out other cases. And all of a sudden without warning four cases topple down. If you request it, you can borrow this magnifying glass, and if you do, if you want to see these pictures, there is a tag on this picture right over here and you can see if you examine it closely, the weight on this case is 1,230 pounds. There appears to be two cases of approximately the same size and two smaller cases in these pictures. As you heard Mr. Dekeuro explain when the case fell he put his hand up and the first one he knocked over his head. He was then buried by the bottom three. Any sensible person, and I'm not saying that this shipowner was insane, would load the heavier cargo on the bottom and the lighter cases on the top, correct?

So that we know that the case that didn't hit him was one of the light ones. So he was buried with between two and three thousand pounds of cargo, with a force heavy enough to break the biggest bone in the body, the femur. The thigh bone, or sometimes called the hip bone. A bone large enough so that by drilling and hammering and driving, you can get the steel pin in the canal where the marrow, the bone marrow is, and by doing that, and you drive it down, the bone marrow comes up through this open channel, this is not perfectly round, and comes out, and this pin goes in. I think it is about eighteen inches, if I am not wrong. This is the exact pin, incidentally. This is not a pin like it. This is the pin that was in Mr. DeMauro's leg. Is driven down there. You heard Dr. Seaman testify as to the procedure used. I'm not going to go into it. Obviously they wouldn't use this procedure unless it was necessary. It is obviously a painful procedure. And then I think February 27th of '72 he went back to this hospital and they took this pin out. That I am going to read to you. I put that hospital record in evidence, too, and I am very greatful I did because there are a couple of very interesting things in this hospital record. The second admission, not the first.

Do you remember Dr. Andriola, who is I.T.O.'s doctor, who was subpoenaed by Mr. Shields to come here, and

all of a sudden he found what no other doctor, what no hospital had in this case, cardiopulmonary symptoms. Dr. Tagliagambe, who saw him a year later for I.T.O, didn't say that. Dr. Graubard didn't say that, Dr. Zaman didn't say that, Dr. LaPeluso didn't say that. The hospital record didn't say that. He was in the hospital from February 27th to March 5th of 1972. Is there any evidence in the second hospital admission of any cardiopulmonary or cardiorespiratory symptoms? I am going to read you the X-rays report from the cardiologist who did make X-rays of Mr. DeMauro's chest. Dr. Andriola, although I asked him to look at the two, only read from the first hospital admission.

First of all, respiratory, as it is shown here. This is the history and all the findings. N for negative. Here it is. Chest. This is the radiologist's report.

"Radiographic examination of the chest in P.A. and lateral views. The lung shows normal degree of aeration. No perineal pathology is observed. The hilly structures are normally defined. The diaphram is visualized as its normal position revealing smooth outline and no signs of any pleural pathology. There is no evidence of any mediastinal enlargement or any other mediastinal pathology. The heart show normal size and configuration. No aorta pathology is discerned. Conclusion: negative chest."

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This is the admission from February 27th to March 5th of 1972. Let me read what they had to do to get that nail out, because the operative procedure is listed here, and you can thumb through this. You can see any exhibit you want to if you ask the judge to see it.

"Under spinal anesthesia, patient was placed on the table and the right hip was prepared and draped. The right hip was then completely **adducted.** A five-inch incision was made over the upper end of the femoral shaft. Dissection carried down through two to three inches of adipose tissue down to the fascia and the tip of the intramedullary nail was exposed. This was covered by a large amount of bony, ossified material. The bone material was then chipped away by means of a bone rongeur, exposing the intramedullary nail which was then attached to the intramedullary and the nail extracted. O was used for closure of the muscle and fascia, black silk for the skin. Patient left the operating room in good condition."

Dr. Andriola did have in his possession a report from Dr. LaPeluse. What that report said specifically was that on April 7th I advised this man to return to work, I felt that maximum benefits had been obtained, and as a matter of fact if you recall Dr. Andriola said that the man did return to work. He returned to work on April 27th, worked and

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then as Dr. Andriola stated, said this: "When trying to lift or bend, he strains his right thigh causing severe pain in right thigh and knee." That is in Dr. Andriola's report. That is an I.T.O. consultant and I.T.O. is in this case up to its teeth, as you can hear from the summations. So if we want to accept the best evidence that the ship or the stevedore has to offer here, a year and a week after the accident this man was told that he could go to work. Nobody said what kind of work, but they said he could go to work. As a matter of fact he tried to work as a holdman. The record shows it. I.T.O.'s doctor says that. That is not even controverted. The important part is: could he or couldn't he work after that? And that is what we are going to have to decide. If you examine carefully, now the doctors' reports aren't in evidence because doctors usually testify and they have said what their reports contain, to you. You will note that the other two of the three doctors in this case examined this man in November. Three doctors examined the man in November. Dr. Seaman for me, because it was part of my job to tell you what this man has. Dr. Murray Burton for the ship, Dr. Tagliagambe for I.T.O. All in November of 1973 because at that time it was clear to all the lawyers that this case was fast approaching trial and they wanted a medical opinion. You have heard Dr. Seaman's qualifications.

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He is the chief of orthopedic surgery at, I believe he named five major hospitals in Brooklyn. He is listed in the Who's Who of American Medicine, in Who's Who in the World, in Who's Who in Foreign Medicine. He is a recognized orthopedic surgeon. He is the only orthopedic surgeon in this case. All the others present were general or traumatic surgeons, which means that they have not passed the board to be an orthopedic surgeon. What did Dr. Graham tell you? We are not trying to guild the lily. He said I don't even consider a fracture of the fibula, it wasn't important. All we are talking abat is the fracture of the femur and the resulting damage from that. We are not trying to tell you that the man had bruises here and bruises there and what about this fracture here. The fracture there healed and it doesn't give him a bit of trouble. We are not asking you to give him any money for that, except what you felt it was worth originally for a fracture, because a fractured bone is worth some money. But now he has no trouble with the lower part of his leg. It is perfectly good. He said that as a result of this accident and the failure to receive the necessary treatment that man's quadriceps muscle, and that is the big muscle in the thigh, a very powerful muscle, atrophied. And the only testimony in this case from all of the doctors is all the treatment this man ever received was that they put the pin in and he would go every

couple of weeks to see the doctor and he's go home. Approximately a year and a half later I.T.O. sent him to a Dr. Goldberg, I believe, and he wanted him to travel two and a half hours each way, three times a week to Brooklyn. And he said I can't do this, give me a doctor in Staten Island. That is the extent of the treatment the man received. No physiotherapy. I don't know, I think all of us are exposed to medical practice, at least on television. We all buy these books, or the Reader's Digest which tell you about the benefits of rehabilitation and physiotherapy. Apparently Dr. Harrison doesn't believe it, Dr. LaPeluse doesn't believe in it. This man didn't get any. We all know that a program of exercise, of supervised exercise, should have been administered. This man should have done it on a physiotherapy basis or physician's care to build up this leg so that it would get back to normal. Instead they let him sit at home for a year until Dr. Seaman saw him, until by that time, two and a half years after the accident that condition is static, there is no way for physiotherapy to repair the condition at this time. Absolutely none. What did this lack of treatment do? Well, it did this: It caused this muscle, this muscle which is one of the most powerful in the entire body -- the heart is probably a more powerful muscle, because the heart is a muscle, to atrophy. And this caused abnormalness of the knee.

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If you took your knee and tried to move it from side to side, you couldn't do that. It is held in place by this quadriceps muscle and the cartilages and the ligaments. As Mr. DeMauro told you, his knee wobbles from side to side. And he said as a result of this, this man cannot do work which requires him, number one and most important, to walk on uneven surfaces, because an uneven surface will cause his knee to give way. To climb ladders. To stand or walk for long periods of time. To bend, because the mobility of the knee and thigh is gone. And to lift.

Now, what evidence do we have that this is true. A year and a half before he saw Dr. Seaman and heard any of this, he saw Dr. Andriola and he said I went to work. When I tried to lift or bend I strained my right thigh and I got severe pain in the right thigh and knee. I tell you this, Mr. DeMauro is incapable of working as a longshoreman, a position he has held for 23 years. I don't have to tell you about the economic condition in this area or even in the country today. I don't know of anybody who is looking to hire a 47-year-old man with a bad leg. They are not a very valuable commodity on the labor market. And we heard or we tried to hear from Mr. Testa that there are jobs as a sorter, as a checker, and as extra labor. You know, Mr. Testa is Mr. DeMauro's employer's representative. Did you hear any testimony

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that I.T.O. offered any of these jobs to Mr. D'Amuro, that there were any jobs available? If they were available, why didn't they give it to him? Did you hear anything like that? It would be a simple thing to say, we will give you a job doing these things. Did anybody come forward and say here's a job? Here's the man's employer. He is sitting -

MR. TESTA: If your Honor please, I object.

THE COURT: There is no legal obligation to do that. There is no evidence of this whatever. I don't think it is a fair argument at this point of time. There is no obligation to give this man a job.

MR. LASOFF: That's correct.

THE COURT: He has legal rights and he is exercising it.

MR. LASOFF: Yes, your Honor. Let's get to the damages. We know the medical expense was $5,049.37 out of pocket. I have offered into evidence a document which you may ask for which shows the hourly wages for longshoremen from 1960 through '73. We are not concerned with 1960. We are not concerned with any year before 1971. At that time a longshoreman able to work, whether work was available or not would have been entitled to $134 a week for every week of the year.

MR. SHIELDS: Your Honor, I object to this. There

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has been absolutely no testimony of this on this record.

MR. LASOFF: I had Mr. DeMauro testify to it, your Honor.

THE COURT: It was testified to. He testified to the hours.

MR. SHIELDS: He said whether there was work available or not.

THE COURT: I don't know whether there is anything in the evidence as to what the union rules are.

MR. LASOFF: He testified if you badge in you get paid, your Honor.

THE COURT: He did testify to that.

MR. LASOFF: Yes, he did.

THE COURT: There is evidence of that in the record.

MR. LASOFF: Incidentally, the longshore union contract year is not from January 1st to December 31st. The contract year on the waterfront is from October 1st to September 30th, so my figures may be a little different. For the 26 weeks exactly from March 31st or April 1st, until September 30th, his loss of earnings amounted to $4,784. On October 1st, 1971, due to the standard union raise the weekly pay, or the hourly pay -- the hourly pay went up to $5.15 an hour and the weekly pay to $206 a week. For that year from October 1st

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of '71 until October 1st of '72 Mr. Lemauro's loss of earnings amounted to $10,712. From October 1st of '72 to October 1st of '73 the hourly pay went up to $5.55 an hour, the weekly pay to $222. His loss of earnings for that year amounted to $11,544. As of October 1, '73, the hourly pay went up to $5.95 an hour, the weekly pay to $238 and as of this date, and I am leaving out three days which we would be entitled to, it is 21 weeks until that time. His loss of earnings from October 1st of '73 until today amounts to an additional $4,999. Making a total of past loss of earnings to date of $32,039. It is our claim and as testified to by Dr. Feaman and by Dr. Graubard, that this man cannot work as a longshoreman. And there has been no evidence that he has or that there is any jobs available for him. We claim his work expectancy would be 65 years of age. We don't expect him to work longer than that. That is about eighteen years. If you take a full year at $238 a week, that amounts to $12,376 a year at the current rate of pay for longshoremen. We don't go beyond that because we can't anticipate future raises, but as of now the current rate of pay for longshoremen is $12,376 a year if you badge in. For the years that he would be expected to badge in, it would be $322,768. This is just a mathematical computation. You can decide all this for yourself. This is an exhibit with all of these hours on it, in evidence.

For 18.22 years of work. This is only part of it. You are going to have to decide how much of it you believe and how much of it is so and how much he should get. We are giving out three items that may be more important than that. Past pain and suffering, future pain and suffering and permanency of injury. Past pain and suffering, that means the pain and suffering he endured from the day of the accident until today. You heard the description of the accident. You heard the description of the operations. You heard the techniques used. You are going to have to put a value on that past pain and suffering. I would say from the first year after the accident a reasonable figure would be $25,000 for that first year of pain and suffering. A reasonable figure. For the two years since, I would say about $5,000 a year. You also heard testimony, I asked the judge to take judicial notice that Mr. DeMauro being a man between the age of 47 and 48, had a life expectancy of 25.22 years. That doesn't mean that Mr. DeMauro is going to live 25.22 years. He could die tomorrow or he could live to be 130. But a man of his age who lived a normal life would be expected to live an additional 25.22 years. You have heard him say that he has pain in that leg all the time. If he doesn't use the leg it is a dull pain. If he does any walking or standing for any length of time, that pain becomes severe. That is my testimony. I say that is

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worth $5,000 a year. I'm not here to ask you to make Mr. DeMauro a rich man. Mr. DeMauro has lived his life not as a rich man. He doesn't have to be made a rich man. He has to be made whole. I am asking you to give him what will make him whole. In loss of earnings, past and future, that amounts to 294; out-of-pocket medical, 5,000 and change, 240. And if you gave all the money that I asked for for pain and suffering, we would be up over 400,000, $450,000. Mr. DeMauro maybe deserved it, but he doesn't need it. I don't want you to give it to him. I want you to give him a sum of money that he can live his life the way he would have if he hadn't been hurt. And to me that sum of money is $300,000. I don't know about you, but I don't think it is a pleasure or a privilege for a man to be deprived of work. I don't think that any man or any woman enjoys sitting home like a vegetable doing nothing. I don't think that anyone would sit there and quietly go crazy with nothing to do if he could work. If you think that people do, that is up to you. I don't think so. I think you have seen Mr. DeMauro. I think you saw on the stand that he didn't wheeze in front of you, he didn't gasp in front of you. He didn't bug you for sympathy. He is not here for your sympathy. We are not asking for sympathy. We are asking to do justice for all times. We are asking you to give him a sum of money that will fairly

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compensate him. We are not here for punitive particulars. He doesn't need that. He needs to be made whole. You can ask for any of these exhibits in evidence. You can examine this pin that I have buried somewhere now and see the size of it, you can read both of these hospital records which are in evidence and which are voluminous. You can read each of the X-rays in evidence, and, incidentally, some statement was made about Dr. Graubard said the disability was due to the bone fragment from the hip. It can't be so. Dr. Graubard said that he never saw the X-rays before he came to court and his report was written long before he came out for one thing.

I have more damages I haven't told you. Permanency of injury. There appears to be no question that this is permanent, even though Andriola told you there was nothing wrong with his leg. Dr. Tagliagambe, a year later, says well, he's got ten percent. Dr. Graubard told you that he has 45 percent loss of use of that leg. That doesn't mean the leg is gone. It means that the functional, the working ability to use that leg has been diminished to the point that a manual laborer really doesn't have any leg to work on. What is that worth? I would say that 45 percent of the leg is worth about $75,000. So I am now up to $525,000. But I don't want any more. I want you to make Mr. Delauro whole. I think

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a fair figure is $300,000. Thank you.

THE COURT: We will take a five-minute recess. Please don't discuss the case in the meantime.

(The jury left the courtroom.)

(Recess)

THE COURT: I am prepared to rule on the requests that are made. I will start with the request made by the third party plaintiff. There are two documents here, but one is a copy of the other. I notice there is a supplemental by the third party defendant, but there is ony one by the third party defendant.

Number one is granted in substance.

Number two is moot because of the motion I just granted; as it 3,4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.

16 is granted in substance. 17 is granted in substance. 18 is granted in substance. 19 is granted in substance. 20 is granted in substance. 21 is granted in substance. 22 is denied in the form requested. 23 is granted in part in substance and in part denied, starting with the word " and" in the fourth line.

24 is granted in substance. 25 is granted in substance. 26 is granted in substance.

27 are the Rules and Regulations. I took judicial notice of that.

28 is granted in substance.

MR. TESTA: If your Honor please, may I have an exception to those requests of the third party plaintiff which your Honor has granted, for the record.

THE COURT: Yes.

Now, taking the third party defendant's requests

I and 2 insofar as they relate to damages is granted in substance. I consider 3 and 4 moot.

Number5 is granted. Number 6 is granted. Number 7, 8, granted in substance. Number 9 is granted in substance. As is 10.

Number 11 is denied in the form requested as is number 12. Number 13 is granted in substance. Numbers 14, 15, 16 and 17 are moot. As is 18, 19,20, 21. 22 is moot.

23, 24, 25, 26, 271 28 is granted in substance. 29 is moot. 30 is moot. 31 is moot.

32 is denied in the form requested. 33 is granted in sutstance. 34 is denied in the form requested. 35 is denied in the form requested. 36 is denied in the form requested. 37 is denied in the form requested. 38, 39 and 40 are granted in substance.

MR. TESTA: May I have an exception, your Honor, to all the third party defendant's requests to charge which your Honor has refused to charge, for the record.

THE COURT: The exception is noted.

I also rule on the additional requests of the third party defendant. Number 1 isdenied in the form requested, as is number 2, 3 and 4. Number 5 is granted in substance, as is number 6, 7, 8 and 9.

MR. TESTA: Your Honor, May I have an exception to your Honor's refusal to those of the third party defendant's additional requests to charge.

THE COURT : The exception is noted. I indicate, when I say granted in substance, what I mean by that is, you will have to pay attentionto the charge and if you are not satisfied with the way the Court covers that particular area in that request, you will have to make it known to me before we finally give the case to the jury.

How much time areyou going to need?

MR. LASCFF: I won't take more than a half hour, your Honor; possibly less.

MR. SHIELDS: Probably less than that.

MR. TESTA: I will bemore than that, your Honor, since I have to cover both situations here.

THE COURT: How much time?

MR. TESTA: I may need an hour. I will try to do it in less, if possible.

THE COURT: All right. Bring the jury in.

(The jury entered the courtroom.)

(Continued on next page.)

(In the courtroom in the absence of the jury.)

THE COURT: Mr. Shields asked that I make the charge on discounting and it comes very late, and it seems to me that at this late time I will have to deny the request, although I will indicate to the jury that certainly this question is in the case, namely that he is getting the money ahead of time and the defendants or the defendant, whoever is finally charged with this, is entitled to a discounting of it.

But it will have to be in very general terms, because I cannot formulate anything now. It goes on the details that Mr. Lasoff is talking about, the possible inflation, and soforth, with pre-judgment and post-judgment; you have to go back under the first three years up until the time of the trial of this case and you add interest there. So, I mean, it is not as simple a problem as you put it. But I think it is a fair request to say that something be said about it and I am going to say something about the effect that they are to realize that while he has been waiting for trial he hasn't gotten any interest on his money; and the defendant, whoever pays this, has to pay it ahead of time, and therefore there should be some discounting in their minds because the money has been paid ahead of time.

But as far as figures are concerned, there is not a bit of evidence in this case whatsoever about any amounts,

any inflation amounts; any discount amounts; anything at all. And that is what puzzled me. But I think you are entitled to it and I will reformulate my charge to the extent that I am going to let them do it as a jury, rather than me do it by giving them figures, because there is no figures in this case whatsoever by anybody. All right.

Bring the jury in.

MR. TESTA: If your Honor please, have you decided on any questions to the jury in connection with my requests?

THE COURT: What requests?

MR. TESTA: I submitted them.

THE COURT: With one finding here, how much the amount is, no. I am not going to submit any special verdict.

MR. TESTA: On the third party action. I submitted them to you.

THE COURT: I am denying them. I won't take any special verdict. I will take a g eneral verdict.

MR. TESTA: General verdict with interrogatories?

THE COURT: No interrogatories. General verdict, period. They either find for you or against you. And you have an exception to the Court's ruling. Bring in the jury.

(The Jury entered the Court room.)

(Continued on next page.)

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THE CLERK: The Court is about to charge the jury.

THE COURT: Members of the jury: we have come down to the tail end of the case now, at which time it becomes my obligation to charge you on the law, and anything that I say during this discussion about the facts in the case, of course don't bind you in any way, anything more than what the lawyers have said about the facts.

We all have memories, but the memory that counts in this case is yours. You are the ones who are the sole judges of the facts and the credibility of witnesses. You remember, I drew this thing on the board here and indicated to you that there were two causes of action.

Of course, the first cause of action was the one in which the longshoreman was suing the ship. The second cause of action in which the ship is suing the stevedore.

In reference to the first cause of action, I have ruled as a matter of law in this case that the plaintiff, the longshoreman, is entitled to recover against the ship, which has a non delegable duty to furnish to this longshoreman a seaworthy place in which to work, a safe place to work.

I find from the evidence in the case that that has been established and that even if you brought in a verdict otherwise as to that aspect of the case, I would simply overrule it, because I don't feel there is any question of fact here that

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is involved in that area of the case.

You are only here to decide questions of fact. I decide the questions of law. The only issue in the first case, then, is what are the damages.

As far as the second case is concerned, you will recall that that is the case of the ship against the stevedore, and in that case it is based on a contract. You never were shown any contract becuase none was produced here; none was marked in evidence. But there is no dispute between the parties that there was in fact a contract between the ship and the stevedore, and that as a part of that contract, although it was not expressly in the contract in so many words, there is what is called an implied warranty as a result of the relationship of these parties that the stevedore will do the work in a workmanlike fashion and with reasonable safety to persons and property. That is what he impliedly warrants to do.

The ship, of course, if you recall when I was picking you as jurors, I indicated to you that the reason the stevedore is on board the ship at all is because he has been called by the ship to give the sailors, who are on board the ship, leave in port and what not. So customarily before these stevedores got into this business the seamen used to do this work.

So they are doing the work of the ship; there

isn't any question about it. But they are doing it as experts. They are hired as e[illegible] and they are supposed to have a certain amount of exper[illegible]

The ship, on the other hand, has obligations too. They are to keep the ship in a reasonably safe condition, the place of work is supposed to be reasonably safe. The various aspects of the ship are to be kept in that condition which a reasonably prudent ship owner would keep his ship in, and that includes cargo and indludes anything on board the ship.

Now, in order to prove any aspect of the case the lawyers rely upon what is called evidence. In this area of the law, since this is the civil side, the quantum of the evidence, that is the amount of evidence necessary to prove a point is called the fair proponderance of evidence.

The kind of evidence that it is, the quality of it, is called credible evidence. So in a case like this, whoever has the burden of proof in any manner must prove it by a fair proponderance of the credible evidence. That is, evidence which is more likely so than is not so.

The usual example given is if you take an apothecary's scale and put the one fellow's evidence on one side and the other fellow's evidence on the other side, before the plaintiff who has the burden of proof can prevail, he must tip the scale.

If it tips the other way, the other fellow

prevails; or if it is even, the other fellow prevails.

Before the proponent of the position can prevail, the scale must tip in his favor.

Evidence is also described as to the source of it. The first is the testimony of witnesses who come here and testify and tell you what they know after they take an oath, and what they have learned by the use of their senses. There is an exception to that, where experts are concerned.

I brought that to your attention before when I said the doctor can give you opinion evidence and also that applies to the Captain and the other man who was a surveyor. They are experts in the field and can give you opinion evidence. The usual witness cannot.

He must only recite facts. Of course, any natural inferences which flow from the testimony may be considered by you and you must consider what is said not only on direct examination, but also on cross examination. Anything you hear from the mouth of the witness you must consider.

Another thing that is evidence are the exhibits in the case. They have been marked and you can look at them and consult them any time during your deliberations.

They next thing that is evidence in this case are the depositions which have been taken and I have explained that to you; that was done under oath and that is evidence in the

case.

The interrogatories are also not exactly in the nature of evidence, they. they are binding upon you when you find them to be in the case. For example, if as a result of an interrogatory the fellow concedes, for example, I operated this car, well, even though that is not evidence in the sense that somebody is testifying to that, that is something you must consider in order to come to your decision.

So you will consider the interrogatories during the course of this examination of the evidence in the case.

Lastly, I would call your attention to stipulations which are entered into between the parties. The first one that comes to mind is the stipulation between the parties that the life expectancy of a Caucasion male, 47 years old at this time is 25 point-something years. Anything that has been stipulated must be considered by you.

Another thing that is evidence in the case as a result of the Court taking judicial notice are the safety rules and regulations of the Department of Labor. That is in the nature of evidence as far as the case is concerned.

What is not evidence, because it is important for you to determine what is not evidence in the case, because you may not consider it in coming to your judgment. The comments of the lawyers and the Court at various times during the course

of the trial; anything we said at that time to each other, that is not evidence in the case.

None of us was sworn; neither the lawyers nor the Court. We didn't testify in this case and we gave no evidence in the case.

Questions which were asked and for which no answer was given; you may not assume that because it was contained in the question, that that is evidence in the case. A simple example I would give you of that is, if a fellow was asked on the witness stand, "when did you stop beating your wife?" well, the fact that the question is asked does not establish that the fellow ever beat his wife at all. And it is isn't answered you may not consider that to be evidence.

That is the same here. There were a lot of questions that were asked here which I sustained objections so. You must disregard the question. It is the answers that are evidence, not the questions.

How do you evaluate evidence in the case? Well, Anglo Saxon jurors for many years have been using certain norms. I will call some of them to your attention. The lawyers have done so too because they are fully aware of this area themselves.

The first is the demeanor of the witness as he sits on the witness stand. How does he impress you? Does he ask

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a question before he answers a question, maybe to borrow time to think? Does he seem to be straightforward? Is he in your opinion evasive? Does the testimony which he is giving conform to the other testimony which you heard in the case and which you already accept?

Essentially what it boils down to is that you don't leave your common sense out here in the courtroom and go in the jury room. You take your common sense with you and you make a judgment on each of these witnesses as to their credibility and other aspects of his testimony with that same fine discernment that you do in your everyday life in matters of great importance to you. You are going to buy a car; you are going to mortgage a house; you listen to the salesman, you listen to the seller. You believe him, you want to see if there are any watermarks down in the cellar where maybe there are some leaks.

You don't take everything for granted when a man tells you that. No more should you take it for granted when a witness tells youthat. You size him up and you use your own common sense and come up with a judgment on the credibility of the witness and what you are going to believe.

Interest plays a great part many times in the testimony or in anybody telling a story, even, to you at home. You know, for example, if a fellow has been in the Marines,

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he is a Johnnie Mann follower. He listens to America being played and the Flag waving and he loves that. That is because it is part of his background. Pathologically we become attuned to certain things.

We know that if a fellow works on the same job with you you are inclined to b e sympathetic with him. That doesn't mean that you are going to go and jump out of a window for him. But you know that he is in the same spot as you are and you keep that in mind.

A number of these longshoremen testified they are in the same job. That doesn't mean to say that they would come down here and made things out of whole cloth because they happen to be in the same job. But at the same time you analyze his testimony and consider it, realizing that he is a longshoreman and but for the grace of God might be on the witness stand as the plaintiff, instead of a witness, and soforth.

You also look into the interest of the doctors in the case. They are professional man; they are experts. They have pride inwhat they do. They sometimes get into a situation where they represent people that are suing. Sometimes they represent people who are being defended; and, of course, you have to keep mind that if they have an interest like that it may affect their judgment and you should look into their background and make your own determination

of how much of that you are going to believe.

With a doctor, of course, as I explained to you before, and this applies also to the Captain and to the other expert witness, that is opinion evidence and when you go looking into the evidence from that aspect, you look into his background and find out whether he has the experience and the background necessary so that he could give you an opinion.

The doctors all went to medical school; they all had qualifications; you heard them. Some less than others. You make the determination as to whether to believe the experts.

Then they are basing their testimony on the facts as they find them, because if they give you an opinion not based on the facts as you find them, it is worthless to you. That applies also to the marine expert, the marine surveyors.

Lastly, all this opinion is advisory. It helps you? It is not conclusive on you. You don't have to accept it if you don't desire to do so. You must consider it , but after considering it, you may accept it or you may set it aside in your mind.

There is a term used during the course of these discussions about ordinary care or reasonable care. It flows through both cases, actually. As far as the liability case is concerned, there is no need to go into that because

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that has been established already. It is of interest, of course, when you discuss the second case.

Ordinary care and the exersice of it is important, because nobody expects perfection from anybody. Perfection per se doesn't exist, I don't think, in anything.

But what they expect is a person to use reasonable ordinary care in the conduct of his business. That applies to a ship owner and it applies to a stevedore.

YOu say, well, what do you mean by ordinary care? Ordinary care means that degree of care which a reasonably prudent ship owner or a stevedore will exercise under the same or similar circumstances as we have here. This must be clear, very clear to you if you give any thought, is a relative term. There is no such thing as ordinary care standing out all by itself someplace.

Suppose a fellow is doing the same thing at the same time under four different conditions. In the first one he lights a match, he is down in a refrigerator plant about 40 feet below the ground where the temperature is 22 degrees and there is a concrete floor and steel walls all around. He throws the match on the ground.

Now he is not in that place, he is in another place. He is in a butcher store with a wooden floor, maybe sawdust -- I don't think they exist any more -- but they used

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to when I was younger. And he throws the match away. He has done exactly the same thing.

Now the fellow is down by a gasoline station; somebody is pumping gas and he throws the same match down by the concrete.

Now the fellow is over in some plant where they make, for example, we used to call it banana oil; very volatile, highly explosive. You could smell it 20 blocks away. And he goes and throws the match. He's done the same thing four times.

Did he exercise ordinary care down in the refrigerator plant. Could anything burn? Clearly it couldn't. But as you go through that range, clearly you see there are different degrees of care required. If he does it in the butcher ship he could have taken the match and felt the end and if it was cold nothing could have happened. In a gasoline station a greater degree of care is needed. Same thing in the banana plant.

But it's always ordinary care, that which a reasonably prudent person would do under the given circumstances of the case.

When we are discussing the obligations of the stevedore and the ship, this expression comes up and that is why I have defined it for you at this time.

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In reference to case number one, the plaintiff has the burden of proving by the fair preponderance of the credible evidence the damages which were proximately caused by the defendant, in this case the ship. The burden of proof I have already described to you.

That is the amount of evidence they must produce, the burden is on him, since he makes the affirmative, he is making an assertion, and in the logic of law, anybody who says a thing is so, should prove it. Credible evidence is, of course, believable evidence. And burden of proof I have defined for you.

Proximately means that in the chain of events this thing is going to happen. It means that to some degree in whole or in part this conduct of the other party has brought this about. It also means, of course, that if what you claim is part of your damages doesn't flow from the incident, then even though it is connected with it in time, your are not responsible for it.

For example, if I am riding in a car and somebody comes along and hits my car and I break my leg, and then the following day I catch cold; the cold is not the responsibility of the fellow I had the accident with. It was not proximately caused by it. It is aside from it.

One of the big disputes in this case is how much

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of this injury is the defendant responsible for? How much did he proximately cause? And that is a very important issue for you to determine, and that, of course, you will do when you examine the totality of the evidence in this case.

Damages in the case, in this particular case, are what are called compensatory damages. They are to find the plaintiff whole. That is all they do. They are not punitive in nature. That is, they are not intended to punish. They are not criminal in nature. They are simply to put him in a positionand make him whole; just as if this accident didn't happen.

I am going to indicate to you in this case on the blackboard how these damages are arrived at and what you are to consider. Because that first case is for all purposes settled in the sense that I have settled the law on it, and the only real question you have is to determine damages, I am going to erase that first part. I will leave the second part there. I am going to indicate to you how damages are arrived at in this kind of a case, so that you may further understand them.

The first thing I'd like to know, is there anyone on the jury who cannot see this or is it blurred , or what?

THE FOREMAN: Because of the glare.

(Pause.)

THE COURT: The accident happened March 31, 1971.

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We are trying the case February 28, 1974.

This X represents work expectancy, which Mr. Lasoff says he is willing to accept age 65. And Social Security and other corporations adopt that same age, 65 as age of retirement. So that is the end of work expectance.

He was 44 years old, here. That would be 21 years.

MR. LASOFF: I think he might have been just about 45 at the time, your Honor.

THE COURT: I thought somebody mentioned 44. All right; I will make it 45.

MR. LASOFF: Date of birth is 11/12/26, your Honor.

THE COURT: 45. So we have work expectance here and this other X represents life expectance. That means from 1971 when the accident happened, 20 years of work expectancy at that time. And from this point of time he has got 17 years. This is approximately 3 years. And the life expectancy is 25 point-something, so that makes it about 72 years old. So from the tim e of the trial until his time of his life expectancy is 25 years, and his work expectancy is 17 years.

The elements of damage in this case, in this kind of a case, are these: Number 1, medical expenses, which in this case have been stipulated to be $5409 and some change.

He is entitled to loss of earnings also. He is

entitled also to loss of earnings. The loss of earnings are in two stages : from the time the accident happened until now. That is the first. I describe that as A.

There is another loss of earnings claim between the time of the trial and the end of his work record, which is at this period in time, when he is 65. I will call that B.

That would mean, then, as I take it, it would be 1971. 17 years plus this.

MR. LASOFF: I think that would be '91, your Honor.

THE COURT: I warned you that I can't add 2 and 2; so you will have to keep that in mind.

He is also entitled to pain and suffering. That pain and suffering can be one period of time, from the time the accident happened until now, which I will describe as C and the pain and suffering from the time of the trial to the life expectancy, which I will make D.

About themedical expenses, there is no dispute between the parties; they have agreed that that has been shown to be $5409. In reference to the earnings there is a sharp dispute between the parties for a number of reasons.

Number 1, they don't agree when he could have gone back to work. One doctor, if you recall, said he could have gone back to work about a year after it happened. Another doctor said a little later. There is evidence that the

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plaintiff himself says of course he couldn't go back to work during this period.

The defendant suggests that in this period of time here between the time of the happening of the accident and the time of the trial his ability to go back to work has returne and there is no need to go past it. If you in fact find that to be the case there is no need to go into this other area of earnings at all, because if he was able to go back to work at this point in time or this point in time, or any point of time before the trial, then his damages for the loss of earnings are limited to that; and you do not go into the discussion of the prospective earnings at all. There is no need to. You only go into that if you are satisfied by a fair preponderance of the credible evidence, and this is the burden of proof that the plaintiff has, to go into that, if you are satisfied by that standard.

Then you go into the future earnings. And then, in the future earnings you are limited to age 65. You cannot go past that. You can find anything in between here that satisfies you from the evidence in the case

That winds up the second area on earnings, except for some other discussion which I will do at the bench.

The pain and suffering is equally divided between now and the time of the accident and there on. Pain and

suffering is not essentially connected with his ability to work. Pain and suffering is connected with the fact that because of his injury he claims that he has certain pain and suffering. The doctors have testified that this kind of an accident produces pain. I don't think we even need a doctor to tell us that. We know that. When a fellow breaks the big bone of his leg he is going to b e in pain.

Of course, some of that pain you have got to realize that the reason why he go to a hospital and the reason why we go to a doctor is to get rid of the pain. All this chipping away at him with this rod, and soforth, that was all done under anesthesia. I don't know, I have been under anesthesia -- I don't know whether any of you have been under anesthesia. All I know is when I came in and when I went out. I don't remember anything in between

I am not testifying here. I'm sorry I did that.

Mr. Lasoff, too, got into somethings on his own where he said, "I think this, I think that." Never mind what he things and what I think and what the lawyers thing. You do the thinking in the case.

In anyevent, figure out how much that pain is. In this area you figure it out not only in this area, C, but in this case figure it out up until the time of his life expectancy. those are the ~~earas~~ in which he is entitled to

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be compensated by you in a fair and equitable manner, as the lawyers have been telling you.

I am going to leave that on there and I am going to refer to it from time to time in some areas that I have here. But that is essentially what is involved in this area of damages.

There is a proposition in law, and I think it is common sense, too, that says that it is the duty of any person who has been injured to use reasonable diligence and reasonable means under the circumstances in order to prevent aggrevation of such injuries and to effect a cure. A person who has been injured is not permitted to recover for damages that he could have avoided by using means which a reasonably prudent person would have used to cure or minimize his injuries or alleviate his condition.

The defendant contends that if the plaintiff had maintained a weight reduction diet and performed exercises that were recommended by several physicians his injuries and pain would have diminished and he would have been able to return to work.

The defendant also contends that the performance of these exercises and the maintainence of a weight reduction diet were not dangerous to plaintiff's health and did not create an undue hardship for the plaintiff if they

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were performed. In determining the nature and permanance of plaintiff's injuries and what damages he may recover for his injruies, you may decide whether by not permanently reducing his weight -- because he did not permanently reduce his weight and did not perform the exercises recommended by the several physicians, plaintiff acted as a reasonably predent person would act under the same or similar circumstances.

In deciding that question you will take into consideration so much of the evidence introduced by both sides as you credit concerning the nature of the diet and exercised recommended. The burden that these would place upon the plaintiff, including whether or not the exercises could be performed in the home and all the other facts and circumstances in this case that you find relevant. If you find that in making the determination not to permanently reduce his weight and not to engage in the recommended exercises the plaintiff acted as a reasonably prudent person would to cure himself, then he is entitled to recover for his injuries and the pain and suffering he endured.

Let me read that part of it again to you, because these are my notes and I apparently have to recast it a little.

If you find that in making the determination not

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to permanently reduce his weight and not to engage in the recommended exercise, the plaintiff acted as a reasonably prudent person would to cure himself, then he is entitled to recover for his injuries, as you find them to be, without regard to the possibility of a permanent weight reduction or the possible benefits of exercise.

If, however, you find that a permanent weight reduction or program of exercise were that which a reasonably prudent person would engage in, and that such conduct would cure or minimize the injury and relieve the pain, you will take those facts into consideration in arriving at the amount of damages that you award.

What we are saying, in effect is that the plaintiff is to exercise that degree of common sense which a reasonably prudent person would do. If he could cure himself, if he could have reduced the damages here, he had an obligation to do so. He is not required to do anything that would hurt him or require great judgment, such as should there be an operation-- that is great judgment.

But here there are essentially two things involved: if he really reduced his weight and if he really would have done the exercises, he wouldn't have had as bad a condition that he wound up with. In considering the damage you will consider that aspect of it.

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There is this to be said about this money, too. From the time of the accident until now he hasn't had this money, and actually, he has been entitled to it. If he would have had the money he could have put it in the bank and gotten some interest; 5 percent, 5 and a quarter -- whatever it is. In arriving at that sum you will keep that in mind.

As far as the other sum is concerned, from the time of the accident -- from the time of the trial until such time as you find he is entitled to more money because of the loss of his earnings, I don't know the exact figure that Mr. Lasoff finally wound up with there, but I think it was something in the order of $222,000, or something like that.

You realize, of course, that if that happened he wouldn't get that money immediately. If he was working he wouldn't get it until he worked all those years. So he is getting the money ahead of time. So you must discount that. You must give him a sum which would the equivalent of it over that period of time.

Keeping in mind, of course, we don't have any testimony in the case one way or the other and we don't have any testimony of the so-called inflation factor. So you h ave a sort of two-sided coin here. You have the

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interest which he gets ahead of time and the inflation which exists. But just keep this in mind. At one time, when he reached the figure of $400,000, if you put that in the bank at 5 percent, we would get $20,000 a year for the rest of his life and never touch the principal. $300,000,he would get $15,000 a year for the rest of his live if he put it in the bank at 5 percent interest and never touch the principal, and wind up with $300,000 at the end of his lifetime.

All parties want you to be fair. Mr. Lasoff told you that and the defendants' lawyers told you that. They didn't say he was not entitled to any money. They said to you, give him a figure which was fair, keeping in mind that here is a man, a 47-year old man now, or 44 at the time of the accident, who was a longshoreman who was earning nine, ten thousand dollars a year, whatever the figures are, they are in there. And this is the kind of person we are talking about.

So that keeping in mind all those aspect of the case, you will consider the totality of the evidence in the case, the fact that the yearly rate has been going up on the wages, and soforth, figure out how much earnings he has lost and figure out these other areas and then come up with one whole figure, that are his total damages, and that will conclude the first case.

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That will be the end of the first case, because at that point you would have to find for the plaintiff because I have directed a verdict for the plaintiff. But you will have to tell me, Mr. Foreman, what the jury has agreed on as the one. That will be one figure. You don't have to split it down into A, B and C, like I had there.

Now we come to the second portion of the case. This is the case between the ship and the stevedore. The duties or obligations owed by the ship owner to an independent longshoreman coming aboard the ship to discharge cargo are quite different from the duties or obligations owed by the ship to the long shoreman's employer, the stevedoring company.

The stevedoring company is assumed to be an expert and experienced in the handling and unloading of cargo, while the individual longshoreman may of may not be.

The duties owed by the ship to the longshoreman are imposed by law, the General Maritime Law and the Common Law, while the duties owed by the ship to the stevedoring company are imposed by the term of the very contract which they drew up between themselves, and required in this case that the stevedoring company unload the cargo.

Here the contract between the stevedoring company and the ship owner obligated the stevedore to discharge the cargo from the S.S. Green Port in a workmanlike manner and

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in a fashion reasonably safe to persons or property. The contract in turn obligated the ship owner to exercise ordinary care under the then existing circumstances to place the ship in such a condition that an expert and experienced stevedoring contractor, mindful of the dangers he should reasonably expect to encounter arising from the ship's service or otherwise, will be able to do his work in the exercise of ordinary care under the then existing circumstances, so that he could unload the cargo in a workmanlike manner with reasonable safety to persons or property and to give the stevedoring company reasonable warning of the existence of any latent, or hidden, danger which has not been remedied, and which is not usually encountered, or reasonably to be expected by an expert stevedore in the performance of the stevedoring work aboard the ship.

If the ship owner actually knows or in the exercise of reasonable care under the then existing circumstances should know of the existence of such danger and the danger is one which the ship owner should reasonably expect the stevedore should encounter during the performance of the stevedoring contract, then there is an obligation on his part to warn the stevedore and to give them notice, and if he doesn't do so, then, of course, you would find for the stevedoring company.

There are two contentions in this case, and they are

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quite simple contentions, actually. I am not going to go into them in great detail because the two lawyers have done well. They have presented their contentions to you very clearly, as I see it.

The ship says, look, we came to New York after we sailed many weeks. The cargo was stowed on the ship not by us, but by other longshoremen, other experts that we hired. We assume that those experts know their business. Actually, we sailed the ship and the cargo was perfectly all right. There was no settlement, no noises heard, nothing reported in the logs. And when the ship got to Bayonne the ship was great. There were no complaints of any kind.

Now, the safety man goes on board the ship the day before and he goes into the hold and says he saw these things shored up. But the next day, when Mr. De Mauro went up there, he didn't see that. Nor did the three or four other men who were there.

What happened to the shoring which the safety man said was there the night before? It's not there any more, if you believe the testimony of De Mauro and the other longshoremen who said that when they were working there, there was no shoring.

So Mr. Shields says, somebody took that away and it wasn't us, because we have only one man on board there

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and he is in charge of the ship, the skeleton crew. The only ones -- and by the way, you remember what I told you what evidence is, the testimony, that the testimony is not only what the man says, but also any natural inferences that flow from that testimony. He draws the inference that somebody in the longshore gang took that off there, so that when these fellows started to work these three cases there and then they did what amounts to really a stipid thing, because, if you have got the pipes here and three cases here and the cargo transverse to the ship up against that, and in effect holding it -- there is dispute on this testimony. I am not saying that is what happened. I am only saying that is the way Mr. Shields argues for his contention.

If you are going to do that, as Capt. Wheeler says, if you are going to do that and you are going to remove the cargo stack in that way, you should start from the other end, not the end that is holding up the cases. And if you do start at the end that is holding up the cases, when you take the first three or four out, you should then take the ones off that are on the top so they can't hurt anybody.

The ship is in effect saying, look, this is an obvious thing that anybody who has eyes could see. The stevedores were down, there, they should have done it; they should have taken steps, and although the ship has a

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non-delegable duty to Mr. DeMauro, we have certain rights that we pay for, namely that they do this work in a workman-like fashion and in a safe way with reasonable safety to persons and property.

On the other hand, Mr. Testa's people say, look, this is crazy. These crates couldn't have been that way. Even their own witness says that with the seas there were and with these crates in this fashion they couldn't be in the position that they were; they would have shifted around. We only did what we were supposed to do and we did it in a workman-like fashion. If there is anything wrong with the cargo, the ship should have told us about it. They should have said, look, this is stacked in such a way that if you take the packages away, it's going to take the lateral support away. We weren't told anything by anybody. We assume that everything is seaworthy and shipshape and it wasn't, because the thing did fall down.

B ut we feel that actually what happened here was that there was shoring. The safety man said there was shoring the night before, and we think the shoring is there because if you look at these pictures you will see shoring all over the place. We don't think the -- the longshoremen either don't know or something happened which gives them a faulty memory about the shoring, but the shoring was there.

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The trouble is that it wasn't sufficient or wasn't proper or done right. So it isn't our fault at all, it's something which the ship was responsible for.

They are concerned with notice, either actual notice or constructive, that is, they either had knowledge or should have known that this condition existed and they should have called it to our attention to cure it.

There is more to these contentions than what I said but they really went over them. I am not limiting it to the discussion that I am having with you. I am showing that you should have discussions among yourselves to arrive at whose fault it is, who is to recover in this case.

In doing this you must consider all the evidence in the case, and after you do, you will ralize that in this aspect of the case where the ship is the third party plaintiff against the third party defendant, the ship has the burden of proof. They must prove by the fair proponderance of the evidence, really three things before you can come in with a verdict for the ship.

The first is, the stev edore failed to ascertain the instability of the crates in question and failed to warn his own employees and the other longshoreman, including De Mauro, of the dangerous condition, and by failing to remove the cargo from the other end of the transverse palletized cargo, by

permitting the longshoremen to work in a hazardous place. That is what the ship must show first.

Secondly, they must show that the breach of the contract by the stevedoring company was the proximate cause of the injuries sustained by the plaintiff. In other words, was it reasonably forseeable by them that if such a condition existed and the boxes fell, would they likely fall down on Mr. De Mauro, and there is no question that it fell on him.

The third thing is, did the ship perform its own obligations fully to the stevedore, and that is, did it furnish a place that was reasonably safe, and soforth, and that they gave them all the notice they were supposed to give him if they knew of a dangerous condition or should have known of a dangerous condition, did they perform those obligations they had to the stevedore.

If you find that the ship did not breach any of its obligations to the stevedore, then, of course, and you find all the other elements that I have disucssed, then, of course, you will find that the ship should recover.

On the other hand, if you feel that they failed to do this and that their contentions as far as the conduct of ths ship is concerned, you agree with those, then, of course, you would find for the defendant.

Sympathy and bias play no part in this case. We

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are all equal under the law; corporations, persons, individuals, partnerships, are all the same as anybody else. We are all legal persons. So the mere fact that there are corporations involved here and longshoremen in and of itself should not prejudice or bias you one way or the other, either sympathetically or otherwise.

You are to decide the case upon the evidence as you heard it in the courtroom and the law as given to you by the Court.

Your verdict must be unanimous. All of you must agree before you can report, Mr. Foreman.

The verdicts in this case will be this:

In the first case, it will be for the plaintiff, because that has already been decided, in a certain amount which you will report. In the second case, you will either find for the ship or for the defendant.

I have one more discussion with the lawyers. You realize that if you find for the ship, then although the ship is primarily non delegably responsible, you then made a claim over and be indemnified by the defendant. So if you find for the ship the defendant will have to pay the money. If you find for the defendant, then the ship will have to pay the money.

I have one last discussion with the lawyers before

we turn the case over to you. If you will excuse me for a minute, we will do that now.

In some of my remarks when I was referring to the defendant, of course, I meant the third party defendant. In the latter part we are talking about the third party defendant ITO, the stevedores.

(At the side bar.)

MR. LASOFF: Your Honor, I have no exceptions. However, I would like your Honor to charge that the burden of proof on mitigation of damages is on the defendants.

THE COURT: I will. I thought I did.

MR. LASOFF: I would also like your Honor to charge, since you mentioned exercise --

THE COURT: The burden of proof on damages is on the plaintiff,

MR. LASOFF: Not on mitigation, your Honor.

THE COURT: Yes.

MR. LASOFF: Also, your Honor charged that three doctors said that exercise would have helped the man. There is no testimony that any doctor prescribed exercise. Dr. Seaman specifically prescribed that he didn't because it was too late; Dr. Andriola said nothing; the the plaintiff testifiedthat Dr. LaPelusa did nothing but see him.

THE COURT: I will tell them as far as the doctors

are concerned, it's their recollection that counts. It is my recollection that any doctor who was asked said that if it was done in time it would have been remedied.

MR. LASOFF: But the plaintiff couldn't treat himself, and all I am asking is that he wasn't advised this.

One other thing; your Honor went into a discussion that while your are under anesthesia, you don't feel any pain. But, of course, when you come out of it, you have a lot of pain.

THE COURT: I don't know. I didn't have that. I had two operations recently.

Any exceptions?

MR. SHIELDS: Yes. I request that your Honor charge my submitted request number 28 that your HOnor said he would charge in substance.

THE COURT: I even forgot to mention the safety rules. All rig ht. That is a request to charge.

Have you got any exceptions?

MR. SHIELDS: One further request for clarity. I don't believe it came out clearly that the stevedore becomes constructively knowledgable of a defective or dangerous condition through the knowledge of the employees.

THE COURT: If you take an exception to that, that is in the nature of a request, more or less. I will deny it

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it with an exception to the defendant/third party plaintiff.

MR. SHIELDS: I think you gave just about all of it.

THE COURT: At this time I'd like to just get exceptions. If there are any requests, I will hear you on the requests.

MR. SHIELDS: I have no exceptions.

THE COURT: Do you have any?

MR. TESTA: Yes, your Honor. I have some very definite exceptions.

Your Honor charged the jury that the ship had the burden of proof on various enumerated things and that they must not only sustain that burden of proof, but they must sustain the burden of proof of proximate cause. And then you said that if they find that the ship did not sustain its burden of proof, that they would find for the defendant.

The ship is the defendant, your Honor.

THE COURT: I meant the third party. I just said that. I corrected that by telling them.

MR. TESTA: I ask your Honor to correct it by referring to my client as the stevedore so they are not confesed with these terms as to who is the defendant.

THE COURT: I already told them.ITO.

MR. TESTA: I specifically ask your Honor to go back and explain tothem that if they find that the ship did not

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sustain its burden of proof, that they must find for the stevedore.

THE COURT: All right.

MR. TESTA: Then you said they must find for the ship or the defendant, at one point. That is the same person.

THE COURT: I kept saying the defendant. It's ITO.

MR. TESTA: What I am saying is that the verdict must be either for the ship or the stevedore.

THE COURT: I understand. I realize I did that, and I turned around as I came away and tried to correct.

MR. TESTA: I don't think that is sufficient. I ask you, please, to do that.

THE COURT: I will do that.

Anything else?

MR. SHIELDS: Here again, I think your Honor omitted the substance of 21.

THE COURT: A lot of these requests are all different phases. You have maybe 8 requests that are all a little different than the other. I can't keep granting them all because they all pretty much cover the same ground.

MR. SHIELDS: I don't think the substance of 21 was covered.

THE COURT: I think I covered that in substance,

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so I deny that.

MR. SHIELDS: I have an exception on that.

MR. TESTA: If your Honor please, you indicated you were going to grant my additional requests to charge 5, 6 --

THE COURT: I said in substance and I feel in substance I have dont that.

MR. TESTA: -- 8 and 9. I don't think you mentioned it at all.

THE COURT: All right. You have an exception.

MR. TESTA: I would ask also in connection with this special verdict, I would ask your Honor to submit questions 8 and 9 to the jury, which I exhibit to the Court, and I'd july like to read them into the record so they are on the record.

THE COURT: No, I think they are contradictory.

MR. TESTA: May I put them on the record?

THE COURT: Put them on the record, but I think they are contradictory. I think with the simple issues that is sufficient.

Mark it as an exhibit and --

MR. TESTA: I would like to read it --

THE COURT: No, I don't want it read. Mark it as an exhibit and it will be in the record.

Court Exhibit 2 is a request by the stevedoreto

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submit what has been labled on this 8 and 9, and the Court declines to do so.

MR. TESTA: I just want the record to show that I ask hat the Court submit these two requests which are marked Court Exhibit 2.

(Court's exhibit 2 marked.)

THE COURT: How many times are you going to do it? You have done it three times on the record now.

MR. LASOFF: One other thing, our Honor. I lov ed your diagram,but I also summed up to the jury on permanancy of injury.

THE COURT: Permanancy of injury is merged --

MR. LASOFF: If your Honor would say that , because I did sum up on it.

THE COURT: All right.

(End of side bar conference.)

THE COURT: The lawyers have again assisted the Court, for which I am thankful; I appreciate it.

There are a few more things that I would call to your attention. I will take them in the order in which we discussed them, actually.

On the question of who has the burden of proof in that first cause of action where the longshoreman is suing the ship, the burden of proof as far as the extent of damages is

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upon the plaintiff, DeMauro. The question of mitigation and that he should have mitigated his suffering, and soforth, and should have tried to h elp himself, the burden of proof on that aspect is on the defendant.

I mentioned something about the doctors saying that he could have done somethings at home or some such remark. When I did that, it was called to my attention that actually it was not all the doctors or three of the doctors or whatever it was, who said that, but one or two of them. In any event, whatever I said about the evidence, you will recall, is subject to correction by you.

If you find that to be the case, just forget about it and use your own recollection. So you will remember that aspect of it.

Mr. Lasoff, in his analysis of what elements of damage there was included something which he called permanent injury. This is merged into the injuries as I have described them. So I haven't particularly set it forth, but it is part of the damages that I described to you.

If you find that the International Terminal Operating Company, Inc. violated the safety and health regulations for longshoring in that the violation resulted in an unseaworthy condition or negligence which proximately caused the plaintiff's injury, then you must find for the

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ship owner against the International Terminal Operating Company, that is, the stevedore.

While I am thinking of that, a number of times I said the defendant, toward the end of my remarks to you. I was intending to say ITO, namely, the stevedore, because in the second case the stevedore is the third party defendant. So that any remarks I made about the defendant at that point were addressed to the stevedore as far as the stevedore was concerned.

I am not going to read various sections of the law because they were read to you by the lawyers. I see no reason to burden you with hearing those again. I had a jury once that was out for about 4 hours and they never reported. I finally asked the Marshal to go in and find out what was stirring, what happened. And so the Foreman came out and said to me, "We have nothing, Judge."

I said, "What do you mean?"

He said, "All along yc have been telling us 'don't discuss the case among yourselves '--" so please, don't get into that situation. This is the point in time when you do discuss the case, exchange opinions, give opinions, do the best you can in deciding the case.

I would suggest to you, however, you don't do that at the giving up of anything that you in uour conscience feel

is right. In other words, let this verdict be one that you feel willnot stultify your oath as a juror, namely one which will be fair to all sides in this case; fair to every one.

Take as much time as you need. I might say to, so you know what my present state of mind is: about 8 or 10 minutes to 5:00 I will come back here again unless I have to come back earlier and at that time if you haven't arrived at a verdict we are going to recess until sometime tomorrow and you will go home and then come back again and continue deliberations.

I don't want anybody to hurry about this. I want you to give it the full thought and consideration you feel it deserves. If you can come up with a verdict before 5:00, great. If you can't we will simply recess until tomorrow; you will go home and come back again tomorrow.

Mrs. Mitchell and Mrs. O'Connor, you re excused with the thanks of the Court. I appreciate your having served. Thank you very much.

THE CLERK: Would you please return to Room 109--

MR. TESTA: Your Honor, may we approach the side bar before the jurors are discharged?

THE COURT: Yes .

(At the side bar.)

MR. TESTA: If your Honor please, although I asked

you to clarify that situation, I think you only further confused the jury, because again you used the terms defendant and you did not use the word stevedore. In the reading of the regulations you referred tomy client by name. But in discussing the charge where you charged them if they find that the ship did not sustain its burden of proof, they must find for the stevedore, for ITO, I ask your Honor --

THE COURT: Read that to him. Tell me what you want me to charge.

MR. TESTA: I ask your Honor specifically to charge the jury that if they find that the ship did not sustain its burden of proof, that they will find a verdict for the stevedore, International Terminal Operating Co.

THE COURT: Inc.?

MR. TESTA: Inc.

THE COURT: Read that to the jury, Mr. Reporter.

MR. SHIELDS: Your Honor, that will give it some emphasis. You have already charged that to them.

THE COURT: I don't see anything to that.

MR. LASOFF: Will your Honor advise the jury if they want anything, they can get it?

THE COURT: Yes.

(End of side bar conference.)

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THE COURT: The Stevedore has made a request to me and rather than paraphrase it, I told him to put it in the record and the Reporter will read it to you. Because I confused the defendant with ITO and the stevedore with somebody else, and he is apparently annoyed, or thinks that this is something that you don't understand. I wantyou to listen to his own words so that you will fully understand what he is talking about.

(Record read.)

THE COURT: One other request was made and that is that if you want the exhibits, simply askthe Marshall who will have you in custody and he will deliver them to you.

I assume there is no objection to that.

MR. SHIELDS: No, your Honor.

THE FOREMAN: Must the verdict be unanimous?

THE COURT: Yes, it must be unanimous. All of you must agree.

The two alternates are excused. Thank you for serving.

(The two alternates were discharged and left the courtroom.)

(At 4:10 PM a Marshall was duly sworn.)

(At 4:10 PM the jury retired to deliberate.)

(Continued on next page.)

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(5:00 PM. The jury entered the courtroom.)

THE COURT: You will rememb er I told you we are going to adjourn at this time. I assume you have no verdict to report and, therefore, I ask you . , during the course of this evening, don't discuss the case with anyone else, nor form or impress any opinion in this matter untilyou come back tomorrow and you can resume deliberations tomorrow at 10:00.

(Adjourned to March 1, 1974.)

oOo

el/jf

PATRICK DE MARCO

vs.

CENTRAL GULF [illegible] CORP.

72 civ. 636

vs.

INTERNATIONAL TERMINAL OPERATING CO.

March 1, 1974
11:40 a.m.

THE COURT: I received a note from the jury, W2 forms for 1969-1971. Two, pay scale for earnings (sic) (for longshoremen), three, photographs (all four), and glass.

(Court's Exhibit 3 marked for identification.)

(In open court - jury present)

(Roll called - all present)

THE CLERK: Mr. Foreman, has the jury agreed upon a verdict in the first case?

THE FOREMAN: Yes, we have. In the first case, $200,000.

THE CLERK: In the second case.

THE FOREMAN: We find for the shipping.

THE COURT: And against the Stevedore?

THE FOREMAN: Yes, sir.

THE COURT: Hearken to your verdict as it has just been recorded. Do you find for the plaintiff in the sum of $200,000 as for the fulp in the second cause of action

21/1f

and against the stevedore, is that your vote? And your answer when your name is called.

(Each juror, having been asked, "Is that your verdict?" answered in the affirmative.)

THE CLERK: The jury is polled, your Honor.

THE COURT: All right. The verdict is recorded. It is not my custom to comment on the jury's verdict and I don't intend to do so now. But I can only say that as long as you voted in accordance with your conscience, no one can criticize you. However, I thank you for your attention, and if you will go down to room 109, for further instructions.

(The jury was discharged and left the courtroom.)

THE COURT: Do you have any motions, Mr. Shields?

MR. SHIELDS: No, your Honor.

THE COURT: Mr. Testa?

MR. TESTA: I would prefer to reserve the motion and make it on paper, your Honor, within the ten-day period provided by Rule 50-B.

THE COURT: That's all right. I have no objection to that. I will wait until I hear from you, then, and I will read the papers.

(11:50 A.M.)

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Joseph C. Andriola	268	273		
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Victor Pinto	392	404		
Paul J. Keeler	418	444	482	485

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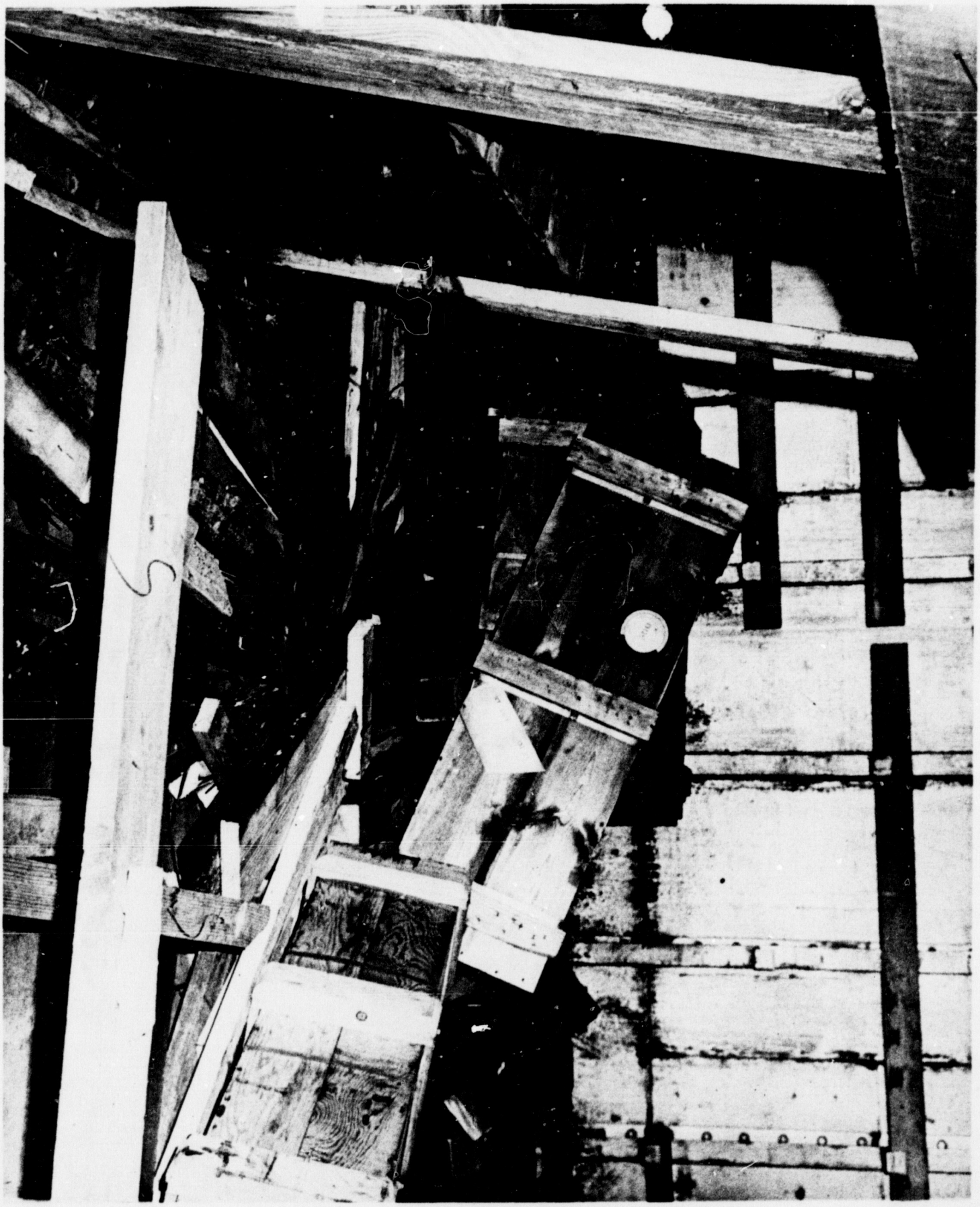
Defendant	Identification	In Evidence
A		121
B	208	

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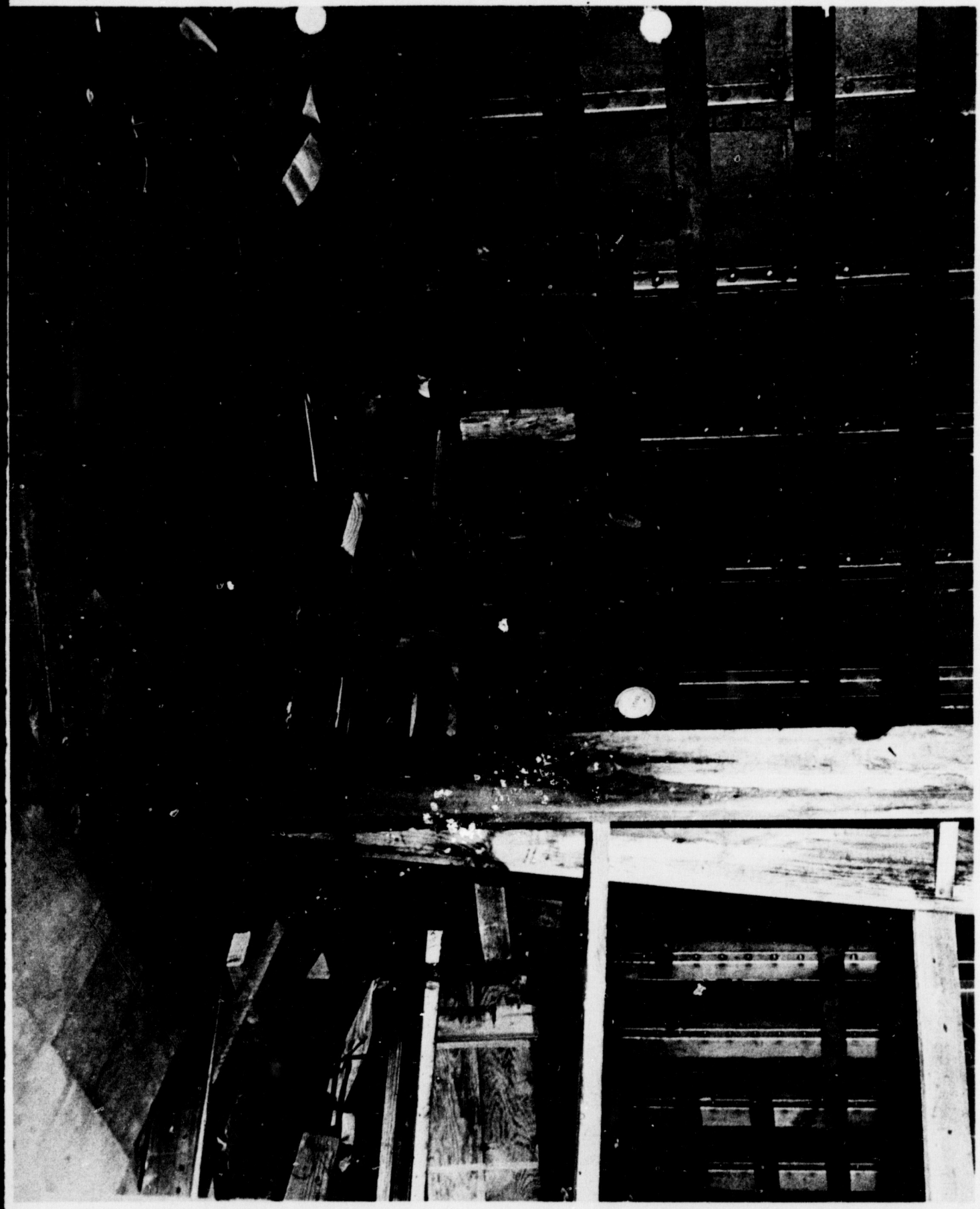
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18		503
Third Party Plaintiff		
1	209	215
2	214	
Third Party Defendant		
B	214	215,495
E	256	
A	401	408

620A

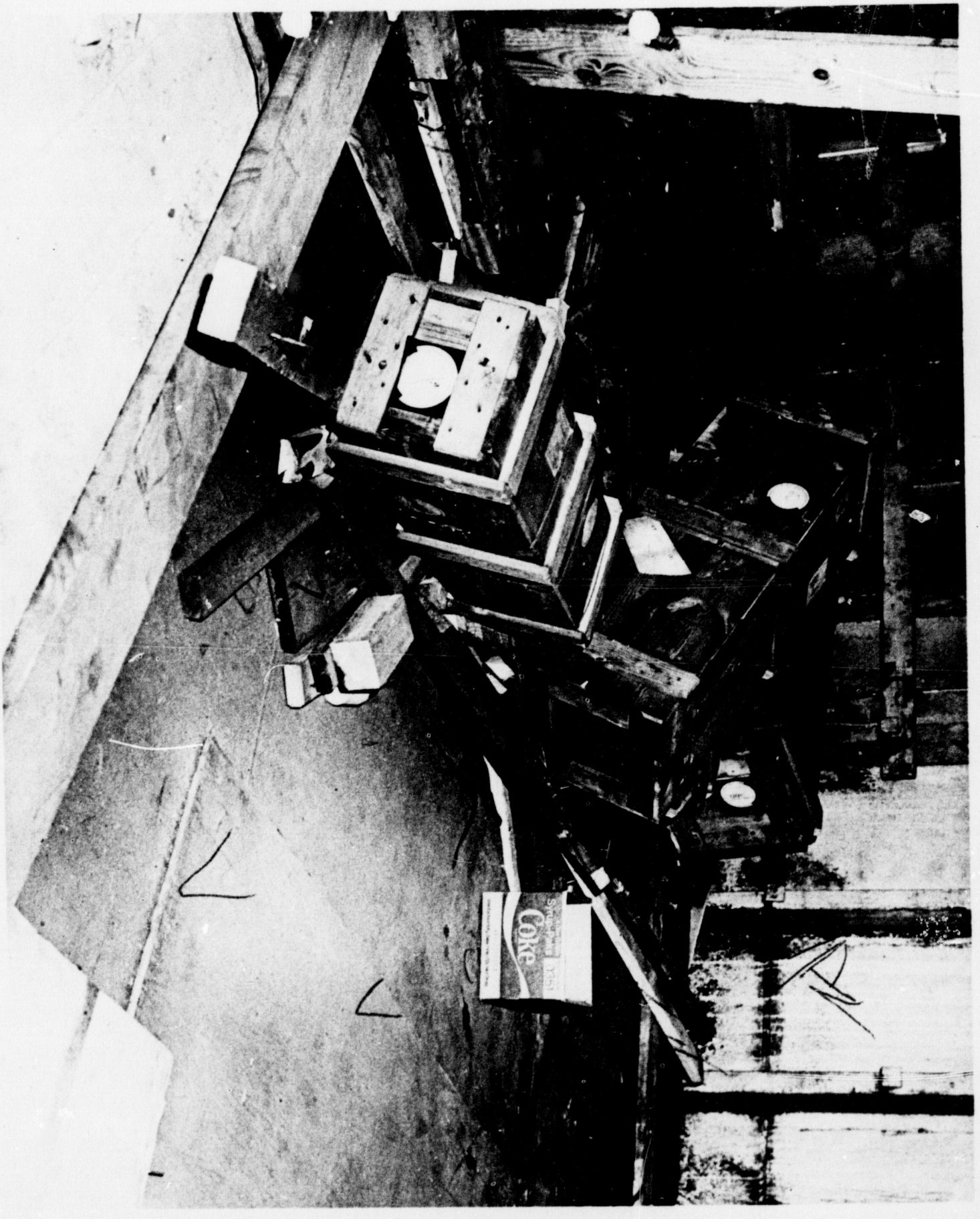
PLAINTIFF'S EXHIBIT 4



PLAINTIFF'S EXHIBIT 5



PLAINTIFF'S EXHIBIT 6



PLAINTIFF'S EXHIBIT 7



624A ENDORSEMENT 72 Civ.636(JMC)

The within motion by third-party defendant, International Terminal erating Co.,Inc., for, in the alternative, entry of judgment non obstante redicto, Fed.R.Civ.P.50(b), or, entry of an order setting aside the verdict d directing a new trial of this action, Fed.R.Civ.P.59, is denied.

A motion for judgment n.o.v. must be denied, if there exists any substantial evidence to support the jury's verdict. In this regard, the credibility of witnesses and the weight of the evidence, which may, in some instances, be proper considerations on a motion for a new trial, are not to be considered by the court. The court must view the evidence in the light most favorable to the party against whom the motion is directed, and such party must be given the benefit of all legitimate evidentiary inferences which may be drawn in its favor. A motion for judgment n.o.v. must be denied if the evidence, as so viewed, would cause reasonable men to differ as to the conclusions of fact to be drawn. On the instant motion, the court has reviewed the totality of the evidence adduced at trial and, applying the standards set forth above, the court concludes that a question of fact, properly within the province of the jury, was presented at trial. The court is not persuaded that only one reasonable conclusion could have been drawn from the evidence. Accordingly, the motion for judgment non obstante veredicto, Fed.R.Civ.P.50(b), is denied.

The third-party defendant's alternative request that the jury's verdict be set aside and a new trial ordered, is similarly denied. The court must not interfere with the verdict arrived at by the jury, unless it is clearly demonstrated that the jury has reached a seriously erroneous result. The verdict should not be set aside merely because the court, if it were sitting as the trier of the facts, would have reached a different conclusion. The reasons advanced by the movant herein do not convince the court that the verdict arrived at by the jury is so seriously erroneous as would warrant its being set aside. The court finds that the verdict reached is not against the weight of the evidence adduced at trial, and that the damages assessed are not excessive. Additionally, the court finds that the third-party defendant was not deprived of a fair trial and that no substantial errors prejudiced its case to the jury. The third-party defendant's Rule 59 motion is denied.

The within motion is denied in all respects.

So ordered.

Dated: New York, N.Y.
April 8, 1974

U.S. DISTRICT COURT FILED APR 9 1974 S. D. OF N.Y.

John M. Cannella
U.S.D.J.

MICROFILM APR 9 - 1974

625A

COPY Mem. OPINION And ORDER

U.S. DISTRICT COURT
FILED
JUL 25 1974
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK DEMAURO,

Plaintiff,

-against-

CENTRAL GULF STEAMSHIP CORPORATION,

Defendant and
Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third-Party Defendant.

#4/016

72 Civil 636

(JMC)

MEMORANDUM AND ORDER

CANNELLA, D.J.:

This longshoreman's personal injury action was tried in chief before this Court and a jury from February 22 to March 1 of this year. The jury returned a verdict in plaintiff's favor against the defendant-shipowner in the sum of $200,000 and in favor of the shipowner, as third-party plaintiff, against the third-party defendant-stevedoring company in a like sum on its third-party claim for indemnification or liability over. On March 6, 1974 a judgment was entered by the Clerk of this Court reflecting the foregoing but making no mention of the third-party plaintiff-shipowner's claim against

the third-party defendant for costs, counsel fees and disbursements in connection with the defense of the plaintiff's action, such issue having been specifically reserved to the Court for determination.

Thereafter, the third-party plaintiff and the third-party defendant, being unable to amicably adjust the question of counsel fees and disbursements, petitioned the Court to hear and determine the amount thereof. An evidentiary hearing on the matter was conducted on June 17 and 18 and July 11, 1974. The Court having now considered the evidence presented thereat in light of the applicable legal standards, hereby fixes the reasonable amount of attorney's fees incurred by the shipowner in defense of the primaryh action at $10,031.60 and the allowable disbursements at $2,405.80, making the total amount of counsel fees and disbursements recoverable by the third-party plaintiff from the third-party defendant $12,437.40.

1/ It is well settled that fair and reasonable counsel fees, as well as disbursements incurred by the shipowner upon its defense of the primary claim are proper elements of indemnification running from the stevedoring company to the shipowner. DiGiola v. United States Lines Co., 304 F.2d 421, 426-427 (2 Cir. 1962). See also, A. C. Israel Commodity Co. v. American-East African Line, Inc., 397 F.2d 170 (3 Cir.), cert denied, 393 U.S. 893 (1968); Felix v. Victory Carriers, Inc., 342 F.Supp. 1386 (D.P.R. 1972); Sanchez v. Lubeck Linie A.G., 318 F.Supp. 921 (S.D.N.Y. 1970).

At the evidentiary hearing, counsel for the shipowner placed into evidence both its time sheets and other documents concerning the instant claim. In addition, the two attorneys which had represented the shipowner in this litigation, John B. Shields and William G. Tormey, Esqs., testified concerning the time and effort which they had expended in connection with the matter, as well as the billing practices of their law firm (Bigham Englar Jones & Houston). On such evidence, counsel for the shipowner asserts that a reasonable counsel fee attributable to the entire case is $25,079 and that the portion thereof which is allocable to the defense of the primary action, hence recoverable from the stevedoring company, is $18,809.25 or 75% of the total fee. Additionally, disbursements in the sum of $2,405.80 are claimed by the shipowner and such amount has not been disputed by the stevedore herein.

In further support of its claim, the shipowner presented the expert testimony of Daniel Huttenbrauck, Esq., a senior partner in the personal injury litigation department of Mendes & Mount. Mr. Huttenbrauck testified that in his opinion the fee claimed by the shipowner was fair, reasonable and necessary within the context of this case and that the 75-25% apportionment of such fee between the defense of the primary action and the prosecution of the

third-party claim was fully justified by the facts of the case.

In opposition to the entry of an award in the amount sought by the shipowner, the third-party defendant, in addition to the cross-examination of Messrs. Shields, Tormey and Huttenbrauck, presented the expert testimony of Sidney A. Schwartz, Esq., the senior partner of the law firm representing the stevedoring company. Mr. Schwartz testified that in his opinion an attorney's fee reasonably resulting from the shipowner's proper conduct of this litigation would be $19,010 and that such fee should be apportioned to reflect an allocation of 25% to the defense of the primary claim and 75% to the prosecution of the third-party claim, thereby allowing the shipowner a recovery herein of approximately $4,750 for counsel fees.

This Court is, of course, bound to follow neither the opinions expressed by the "experts" nor the amount of the fee claimed by the shipowner. 2/ Rather, it must determine a fee which is both fair and reasonable in light of all of the circumstances of the case. In this regard, the Court must act to exercise its discretion, both as to the amount of the fee and its apportionment, in accordance with certain well recognized standards. "[D]ue consideration [must be

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2/ Arico v. Cie. De Navegacion Transoceanique, 409 F.2d 1002, 1003-1004 (2 Cir. 1969).

given to] the length of time spent, the problems involved, the standing of counsel at the bar, and the result."[3/]

Applying these standards to this relatively run-of-the-mill longshoreman's personal injury action, and analyzing the evidence presented on the question of counsel fees in light of the factors stated above, the Court finds that the fee claimed by the shipowner for its representation in the entire lawsuit, including the claim over, namely, $25,079, is both fair and reasonable. However, the Court does not agree that the apportionment of 75% of this fee to the defense of the primary claim reflects a proper allocation of the time and effort expended by counsel on the two separate claims for which the representation was rendered. Rather the Court concludes, upon all of the relevant evidence, as well as the routine nature of this case, that the proper allocation of the fee between the shipowner's defense of the primary claim and its prosecution of the third-party claim is 40% to the former and 60% toward the latter. Thus, upon consideration of all of

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3/ Id. at 1004. See also, Paolillo v. American Export Isbrandtsen Lines, Inc., 305 F.Supp. 250 (S.D.N.Y., 1969); McGee v. M. S. Meijyusan Maru, 239 F.Supp. 170 (E.D.La. 1965); In re Osofsky, 50 F.2d 925, 927 (S.D.N.Y. 1931); Code of Professional Responsibility of the American Bar Association § DR 2-106; cf. City of Detroit v. Grinnell Corp., 495 F.2d 448, 468 et seq. (2 Cir. 1974).

the factors involved, the Court determines that the fair and reasonable amount of counsel fees incurred by the shipowner in defense of the primary action and, therefore, recoverable from the third-party defendant herein, is $10,031.60.

Therefore, considering the nature of this action, the results of the trial and the evidence presented at the evidentiary hearing, as well as the applicable legal standards, the Court concludes that the defendant-third-party plaintiff, Central Gulf Steamship Corporation, is entitled to recover from the third-party defendant, International Terminal Operating Co., Inc., the sum of $10,031.60, representing the fair, reasonable and necessary counsel fees incurred by it in connection with the defense of plaintiff's claim, together with chargeable disbursements in the sum of $2,405.80, making a total award of counsel fees and disbursements of $12,437.40 and directs that the judgment heretofore entered herein on March 6, 1974 be amended accordingly. 4/

4/ See, cases cited at note 1, supra. See also, Cinerama, Inc. v. Sweet Music, S.A., 482 F.2d 66 (2 Cir. 1973); Aetna Cas. & Sur. Co. v. Giesow, 412 F.2d 468 (2 Cir. 1969).

Let the Clerk of the Court amend the judgment heretofore entered herein on March 6, 1974, so as to include the foregoing award in favor of the third-party plaintiff against the third-party defendant.

SO ORDERED.

/s/ John M. Cannella

JOHN M. CANNELLA
United States District Judge

Dated: New York, N. Y.
July 24, 1974.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC
FILED
8-22-74
SDNY

PATRICK DEMAURO,

Plaintiff,

-against-

CENTRAL GULF SS CORP.,

Defendant and Third-Party Plaintiff,

-against-

INTERNATIONAL TERMINAL OPERATING CO.,

Third-Party Defendant.

72 Civil 636 (JMC)

AMENDED JUDGMENT

#74696

The issues in the above entitled action having been brought on regularly for trial before the Honorable John M. Cannella, United States District Judge, and a jury on February 22, 25, 26, 27, 28 and March 1, 1974, and the jury having returned a verdict in the amount of $200,000 in favor of the plaintiff against the defendant and third-party plaintiff, and over against the third-party defendant, and Judgment, #74,238, having been entered on March 6, 1974 on the jury verdict in the amount of $200,000 in favor of the plaintiff against the defendant and third-party plaintiff and over against the third-party defendant, and the issues of indemnity for counsel fees and disbursements in favor of the defendant and third-party plaintiff against the third-party defendant having, by stipulation of all parties been reserved to the Court for determination, and been brought on for trial before the Honorable John M. Cannella, United States District Judge, on June 17, 18 and July 11, 1974, and the Court having rendered a decision in favor of the defendant and third-party plaintiff and against the

third-party defendant for the sum of $12,437.40, it is,

ORDERED, ADJUDGED AND DECREED, that the defendant and third-party plaintiff, CENTRAL GULF SS CORP., have Judgment against the third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., in the amount of $12,437.40, with costs.

Dated: New York, New York
August 21, 1974
22

S/ Raymond F Burghardt
Clerk

9644:
AVT:EH

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

634A

PATRICK DE MAURO,

Plaintiff,

-against-

CENTRAL GULF SS CORP.,

72 Civ. 636 MC

Defendant and Third-Party Plaintiff,

NOTICE OF APPEAL

-against-

INTERNATIONAL TERMINAL OPERATING CO. INC.,

Third-Party Defendant.

S I R S :

PLEASE TAKE NOTICE that the third-party defendant, INTERNATIONAL TERMINAL OPERATING CO. INC., hereby appeals to the United States Court of Appeals for The Second Circuit from the interlocutory judgment, dated March 6, 1974, and filed that day with the Clerk of the United States District Court for the Southern District of New York which granted judgment in favor of the plaintiff, PATRICK DE MAURO, in the amount of $200,000 against the defendant and third-party plaintiff, CENTRAL GULF SS CORP., and thereafter granted judgment in that amount in favor of the defendant and third-party plaintiff against the third-party defendant and the third-party defendant appeals further from the final and amended judgment of August 22, 1974 which adjudged that the defendant and third-party plaintiff have judgment against the third-party defendant in the amount of $12,437.40 representing counsel fees and disbursements to which the District

Court determined the defendant and third-party plaintiff was entitled.

PLEASE TAKE FURTHER NOTICE that the third-party defendant appeals from the interlocutory judgment of March 6, 1974 and each and every part thereof and from the final and amended judgment of August 22, 1974 and from each and every part thereof.

Dated: New York, N.Y.
September 9 , 1974

Member of the Firm
of
ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for third-party defendant
801 Second Avenue
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TO:

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Attorneys for Plaintiff
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BIGHAM,ENGLAR,JONES & HOUSTON, ESQS.
Attorneys for Defendant and
third-party plaintiff
99 John Street
New York, New York 10038

filed
U.S. Dist. Court
Sept 24 - 3:16 PM - 74
S.D. of NY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK DEMAURO,	:	
Plaintiff,	:	72 Civil 636 (JMC)
-against-	:	NOTICE OF PROTECTIVE CROSS
CENTRAL GULF SS CORP.,	:	APPEAL
Defendant and Third-Party Plaintiff,	:	
-against-	:	
INTERNATIONAL TERMINAL OPERATING CO.,	:	
Third-Party Defendant.	:	

S I R S :

PLEASE TAKE NOTICE, that the defendant and Third-Party Plaintiff, CENTRAL GULF SS CORP., hereby appeals to the United States Court of Appeals for the Second Circuit from that part of the judgment, dated March 6, 1974, and amended on August 22, 1974, and filed that day with the Clerk of the United States District Court for the Southern District of New York, which granted judgment in favor of the plaintiff, PATRICK DEMAURO, in the amount of $200,000.00 against the defendant and Third-Party Plaintiff, CENTRAL GULF SS CORP., and further appeals as to the adequacy of that part of the amended judgment, dated August 22, 1974, and filed that day with the Clerk of the United States District Court for the Southern District of New York, which granted judgment in favor of the defendant and Third-Party Plaintiff, CENTRAL GULF SS CORP., in the amount of

$12,437.40 for counsel fees and disbursements against the Third-Party defendant.

Dated: New York, New York
September 24, 1974.

JOHN B. SHIELDS
Member of the Firm
BIGHAM ENGLAR JONES & HOUSTON
Attorneys for Defendant and
Third-Party Plaintiff,
Office & P. O. Address
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TO:

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Attorneys for Plaintiff
160 Broadway
New York, New York

ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for Third-Party
Defendant
801 Second Avenue
New York, New York 10017

Service of 2 copies of this within
APPENDIX is admitted this
6TH day of DECEMBER 1974

ATTORNEYS FOR PLAINTIFF-APPELLEE

ATTORNEYS FOR DEFENDANT & THIRD-PARTY
PLAINTIFF-APPELLEE

2 COPIES RECEIVED
DEC 6 1974
Brigham, Engl[illegible]